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RECORD, CASES NOS. 14845 AND 14846.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

TERM NO., 918.

THE UNITED STATES, APPELLANT,

vs.

BIRD L. FLETCHER.

TERM NO., 919.

BIRD L. FLETCHER, APPELLANT,

vs.

THE UNITED STATES.

APPEALS FROM THE COURT OF CLAIMS.

FILED SEPTEMBER 18, 1891.

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1 IN THE COURT OF CLAIMS.

BIRD L. FLETCHER
vs.
THE UNITED STATES. } No. 16702.

I.—*Petition. Filed December* 11, 1889.

2 II.—*Traverse. Filed December* 13, 1889.

3 III.—*Amended petition. Filed December* 16, 1890, *as a substitute for the original petition.*

To the honorable the Court of Claims:

The claimant, Bird L. Fletcher, respectfully represents:

The claimant was on the 27th day of December, in the year 1859, enlisted in the general mounted service of the Army; was transferred to the 1st Cavalry January 18, 1860, and assigned to Troop I, which subsequently became Troop I of the 4th Cavalry; joined the troop February 18, 1860; was promoted corporal January 23, 1863, and discharged March 26, 1863. February 24, 1863, he was appointed second lieutenant in the 4th Regiment of Cavalry, United States Army, to rank from February 19, 1863, and accepted the appointment March 27, 1863. He was
4 brevetted first lieutenant May 10, 1863, for gallant and meritorious service in cavalry action at Franklin, Tennessee. October 12, 1864, he was promoted first lieutenant, and served as such until promoted captain, August 25, 1867. On June 19, 1868, he was retired from active service on the ground that he was incapacitated for the same as the result of sickness and exposure incident to the service, wherefore the President directed that his name be placed upon the list of retired officers of that class in which the disability results from long and faithful service, or from some injury incident thereto.

On the 29th of June, in the year 1872, a court-martial was assembled at the city of Philadelphia, in the State of Pennsylvania, before which the claimant was brought to trial on a certain charge and certain specifications, charging him with having contracted and failed to pay certain debts, many of them being of over two years' standing, and therefore barred by limitation from the consideration of said court-martial, and as to all of which they were wholly unaccompanied with the slightest allegation or pretence that they had been in any manner fraudulently contracted, or that the claimant was at any time able to pay the same, thereby failing to charge him with any offence whatever known to the Articles of War of the United States, or to the law military of this or any other civilized nation, but on the wholly inadmissible and absurd pretence that the actions so charged constituted "conduct unbecoming an officer and a gentleman," in violation of the 61st (formerly 83d) article of war.

To such charge and specifications the claimant pleaded not guilty, and insisted before said court-martial that the actions so charged constituted no offence in violation of the 61st or any other of the Articles of War, but said court-martial nevertheless, on or about the 16th day of July,
5 in the year 1872, found the claimant guilty on such charge and

specifications, and sentenced him to be dismissed the service, on which proceedings and sentence the Secretary of War made the following indorsement:

WAR DEPARTMENT, *July 24th*, 1872.

In conformity with the 65th of the Rules and Articles of War, the proceedings of the general court-martial in the foregoing case have been forwarded to the Secretary of War for the action of the President.

The proceedings, findings, and sentence are approved, and the sentence will be duly executed.

WM. W. BELKNAP,
Secretary of War.

This order the claimant avers was wholly null and void, as the same was the act only of the Secretary of War, and the proceedings and sentence of said court-martial were never acted upon by the President of the United States until the year 1888, as hereinafter stated.

On the 27th day of March, in the year 1888, the claimant addressed a petition to the President of the United States, setting forth that the charges and specifications formulated against him, and upon which he was tried, were, in fact and in law, contrary to all precedent, and the conclusion arrived at was not in conformity with the same, and that the order of the Secretary of War purporting to approve said court-martial proceedings was illegal and void, and that he, the claimant, had always remained an officer of the Army on the retired list; notwithstanding which the President of the United States did, on the 5th day of July, in the year 1888, make an order approving, or purporting to approve, the proceedings, findings, and sentence of the court-martial in the case of the claimant as aforesaid, which order of the President was on the 12th day of July, 1888, promulgated from the Adjutant-General's Office by Special Orders, No. 160, of that date.

6 The claimant, however, now submits that the proceedings, findings, and sentence of said court-martial, together with the approval thereof by the Secretary of War in 1872, and by the President of the United States in 1888, were and are wholly null and void for the following reasons:

1. Because said court-martial acted wholly in violation of law in trying and convicting the claimant on a charge and specifications stating no offence whatever within any of the Articles of War.

2. Because, as to the order of the Secretary of War in 1872, the same was not the act of the President of the United States, by whom alone, under the 106th (formerly 65th) of the Articles of War such a sentence can be confirmed.

The claimant was last paid to the 24th of July, 1872, or thereabouts, and made application for his subsequent pay to the Paymaster-General of the Army, by whom the same was referred to the accounting officers of the Treasury, who rejected the claim for such subsequent pay.

The claimant, not waiving any of his pay from the 24th of July, 1872, but hereby expressly reserving the right to proceed at such time and in such manner and before such tribunals as he may be advised by counsel for all of the same not herein specifically set forth and claimed, now claims in this action to recover his pay as a captain of the United States Army, retired,

from the 1st day of December, in the year 1883, to the 30th day of November, in the year 1890, being a period of seven years, and amounting, at the rate of two thousand one hundred dollars ($2,100) a year to the sum of fourteen thousand seven hundred dollars ($14,700).

The claimant made application to Congress in the 43d, 44th, 45th, 46th, and 50th Congresses for restoration to the Army, which applications were without much consideration, and probably on the adverse recom-
7 mendation of the War Department, adversely reported on two occasions in the Senate, but never reported on in the House of Representatives.

No other action than as aforesaid has been had on this claim in Congress or by any of the departments.

The claimant is the sole owner of this claim and the only person interested therein, and no assignment or transfer of this claim, or of any part thereof or interest therein, has been made.

The claimant is justly entitled to the amount herein claimed from the United States after allowing all just credits and offsets. The claimant is a citizen of the United States, and has at all times borne true allegiance to the Government thereof, and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government; and the claimant believes the facts as stated in this petition to be true. And the claimant claims fourteen thousand seven hundred dollars ($14,700) besides costs.

GEORGE A. KING,
Attorney for Claimant.

STATE OF PENNSYLVANIA,
County of Philadelphia, ss:

Bird L. Fletcher, being duly sworn, deposes and says: I am the claimant in this case. I have read the above petition, and the matters therein stated are true, to the best of my knowledge and belief.

BIRD L. FLETCHER.

Subscribed and sworn to before me this 15th day of December, 1890.
[SEAL.] EUGENE J. LINDSAY,
Notary Public.

8 IV.—*General traverse to amended petition—Filed Dec'r 22, 1890.*

And now comes the Attorney-General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained, and asks judgment that the petition be dismissed.

And as to so much of the said petition as avers that the said claimant has at all times borne true faith and allegiance to the Government of the United States, and ha not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government, the Attorney-General, in pursuance of the statute in such case provided, denies the said allegations, and asks judgment accordingly.

JOHN B. COTTON,
Assistant Attorney-General.

9 V.—*Findings of fact and conclusions of law—Filed June* 8, 1891.

This case having been heard before the Court of Claims, the court, upon the evidence, finds the facts to be as follows:

I.

On December 27, 1859, the claimant was enlisted in the general mounted service of the Army; was transferred to the First Cavalry January 18, 1860, and assigned to Troop I, which subsequently became Troop I of the Fourth Cavalry; joined the troop February 18, 1860; was promoted corporal January 23, 1863, and discharged March 26, 1863.

February 24, 1863, he was appointed second lieutenant in the Fourth Regiment of Cavalry, U. S. Army, to rank from February 19, 1863, and accepted the appointment March 27, 1863.

He was brevetted first lieutenant May 10, 1863, for gallant and meritorious service in the cavalry action at Franklin, Tenn

October 12, 1864, he was promoted first lieutenant.

He served as first lieutenant until promoted captain, August 25, 1867.

June 19, 1868, he was retired from active service, and placed on the retired list of the Army as per the following order:

SPECIAL ORDERS, } HEADQUARTERS OF THE ARMY,
No. 146. } ADJUTANT-GENERAL'S OFFICE,
Washington, June 19, 1868.

3. A board of examination having found Captain B. L. Fletcher, 4th U. S. Cavalry, "incapacitated for active service, and that said incapacity is the result of sickness and exposure incident to the service," the President directs that his name be placed upon the list of retired officers of that class in which the disability results from long and faithful service, or from some injury incident thereto, in accordance with section 16 of the act approved August 3, 1861.

By command of General Grant:

E. D. TOWNSEND,
Assistant Adjutant-General.

II.

July 10, 1872, a court-martial was convened at Philadelphia, Pennsylvania, by virtue of Special Orders, No. 28, dated June 29, 1872, Headquarters Military Division of the Atlantic, for the trial of Captain Bird L. Fletcher (retired). Before this court-martial Capt. Fletcher was arraigned and tried on the charges and specifications annexed to and forming part of these findings.

The claimant managed his own case in person before said court-martial, and was not represented by counsel.

10 III.

The proceedings, findings, and sentence were transmitted to the Secretary of War, who wrote upon the record the following order, viz.:

WAR DEPARTMENT,
July 24th, 1872.

In conformity with the 65th of the Rules and Articles of War, the proceedings of the general court-martial in the foregoing case have been forwarded to the Secretary of War for the action of the President.

The proceedings, findings, and sentence are approved, and the sentence will be duly executed.

WM. W. BELKNAP,
Secretary of War.

From the date of this order the claimant has received no pay as an officer of the Army.

IV.

The Judge-Advocate-General of the Army having, in 1888, reported to the Secretary of War that "in his [Captain Fletcher's] case there is no evidence of any action by the President at any time, and, following the precedent in Runkle's case, it is still subject to the President's action, which is not barred by any statute of limitations;" and the Secretary of War having thereupon informed the President "that Captain Fletcher is still undoubtedly an officer of the Army, and that the proceedings of the court which tried him are now awaiting action by the President," the President, on July 5, 1888, made an order that "the proceedings, findings, and sentence of the court-martial in the foregoing case of Bird L. Fletcher, captain in the United States Army (retired), are hereby approved."

The reports and orders above referred to are annexed to and form part of these findings.

V.

By orders from the Headquarters of the Army, dated September 14, 1869, the claimant's pay was stopped on account of some unsettled balances claimed to be due from him on account of subsistence fund stores, and property funds and stores, and other disallowances made by authority in his accounts.

By further order dated January 13, 1870, the former order was so modified as to allow the claimant to draw his pay for September and October, 1869.

On June 15, 1870, the balance claimed on said accounts was stated by orders at two hundred and thirty-seven dollars and sixty-four cents ($237.64), and that amount was stopped from the pay of Capt. Fletcher, the claimant.

VI.

The retired pay to which the claimant would have been entitled from December 1st, 1883, including longevity increase, was at the rate of $2,100 per annum.

VII.

Claimant did not dispute at the War Department the validity of his dismissal July 24, 1872, in pursuance of the sentence of the court-
11 martial, for a period of nearly 16 years, but did promptly petition Congress for redress and urge his restoration to the retired list. He made application for pay to the accounting officers of the Treasury after March 1, 1888.

VIII.

When Captain Fletcher was dismissed the service as an officer on the retired list by sentence of a court-martial, the retired list being limited to 300 (R. S., 1258, and references), was filled to its maximum in the following manner:

On the 24th of August, 1872, Captain Edward S. Meyer, Seventh Cavalry, was retired to fill vacancy. The vacancy caused by the retirement of Captain Meyer was filled by and with the consent of the Senate by the promotion of First Lieut. Francis Moore to be captain Ninth Cavalry from August 24, 1872.

Conclusions of law.

And on the foregoing finding of facts the court decides as conclusion of law:

The claimant should recover the pay of his rank on the retired list from the 1st of December, 1883, when the statute of limitations began to run, to the 5th of July, 1888, when the sentence of the court-martial was confirmed by the President.

The following are the charges and specifications of the court-martial, and the reports and orders referred to in the foregoing findings:

Charges and specifications.

CHARGE.—Conduct unbecoming an officer and a gentleman.

Specification I.—In this, that he, Captain Bird L. Fletcher, U. S. Army (retired), having, with promise of payment as soon as he received his pay due him from the paymaster, become justly indebted to H. S. Wagner, merchant, of Stroudsburg, Pa., in the sum of one hundred (100) dollars for supplies and various articles of merchandise furnished him by the said Wagner, in the said borough, at various dates between the 10th May and the 4th June, 1870, has, with the exception of the sum of twenty-five (25) dollars paid on account on the 28th September, 1870, up to the present time, without just cause and with intent to defraud, continuously failed, neglected, and refused to pay the said Wagner the amount of said indebtedness, although repeatedly requested by the said Wagner to do so about and subsequent to the 1st August, 1870.

Specification II.—In this, that he, Captain Bird L. Fletcher, U. S. Army (retired), having, with promise of payment at the expiration of a month, become justly indebted to Joseph Wallace, merchant, of Stroudsburg, Pa., in the sum of fifty-five (55) dollars and ten (10) cents for supplies and various articles of merchandise furnished by the said Wallace to the said Fletcher, in the said borough, at various dates between the 28th September and the 2d November, 1870, has, up to the present time,

without just cause and with intent to defraud, failed, neglected, and refused to pay the said Wallace the amount due him, or any part or portion thereof, though repeatedly requested by the said Wallace to do so on and subsequent to the 2nd November, 1870.

Specification III.—In this, that he, Captain Bird L. Fletcher, U. S. Army (retired), having, with promise of speedy payment, become justly indebted to Messrs. R. F. and H. D. Bush, merchants, of Stroudsburg, Pa., in the sum of sixty-two (62) dollars and fifty-one (51) cents for various articles of merchandise furnished him by the said firm, in the said borough, at various times between April 14th and November 2nd, 1870, has, with the exception of forty (40) dollars and seventy-five (75)
12 cents paid on account on June 17th, 1870, and August 30th, 1870, up to the present time and without just cause and with intent to defraud, failed, neglected, and refused to pay the said firm the amount due them, although frequently requested by the members of the said firm to do so at different dates subsequent to the 1st July, 1870.

Specification IV.—In this, that he, Captain Bird L. Fletcher, U. S. Army (retired), having, with promise of speedy payment, become justly indebted to Simon Fried, merchant, of Stroudsburg, Pa., in the sum of twenty-eight (28) dollars for various articles of merchandise furnished him by the said Fried, in the said borough, at various times between September 10th and November 16th, 1870, has, with the exception of the sum of ten (10) dollars paid on account on 31st October, 1870, up to the present time, without just cause and with intent to defraud, failed and neglected to pay the said Fried the amount of said indebtedness, although repeatedly requested to do so by the said Friend about and subsequent to November 16th, 1870.

Specification V.—In this, that he, Captain Bird L. Fletcher, U. S. Army (retired), having, with promise of speedy payment, become justly indebted to J. Ingraham Allender, proprietor "Stroudsburg House," Stroudsburg, Pa., in the sum of forty-two (42) dollars, for board between certain days in the months of March and May, 1870, has, with the exception of eighteen (18) dollars paid on account up to the present time, without just cause and with intent to defraud, continuously failed, neglected, and refused to pay the said Allender the amount of the indebtedness, although frequently requested by the said Allender to do so at different dates subsequent to the 1st July, 1870.

Specification VI.—In this, that he, Captain Bird L. Fletcher, U. S. Army (retired), did, in the city of Paducah, Kentucky, on the 5th February, 1872, borrow the sum of thirty (30) dollars from Edward Baker, assessor internal revenue, 1st district Kentucky, representing that he (Fletcher) needed that sum in addition to the sum he had on hand to purchase the stock and fixtures of the Cumberland House, of Paducah, Kentucky, which he (Fletcher) had an opportunity to buy, and promising, on the honor of an officer and gentleman, to repay the said loan at the end of the month in which it was made, or as soon thereafter as he (Fletcher) got his pay from the paymaster; and, notwithstanding, the said Fletcher never completed the transaction for which the money was loaned; the said Fletcher did not return the said amount of money to the said Baker at the time, nor has he (Fletcher) at any time repaid him the said amount, although repeatedly requested to do so by the said Baker at different dates, from a day or a few days after the contraction of the said debt until on or

about the 6th June, 1872, when the said Fletcher left the city of Paducah; and, moreover, that the replies made by said Fletcher to the said Baker whenever asked by him to pay the said debt, which replies were to the effect that his (Fletcher) pay was stopped by authority until certain accounts should be adjusted, were false and calculated to deceive the said Baker; and further, that about ten (10) days previous to the said Fletcher leaving Paducah, Kentucky, as stated above, he promised the said Baker he would not leave without paying the debt in question, or giving security to do so, which promise was never fulfilled, the said Fletcher leaving Paducah, Kentucky, without notification to or settlement with the said Baker.

This on and about the dates and at the places specified above.

RICHARD C. DRUM,
Colonel and Assistant Adjutant-General.

To which the accused pleaded as follows:
To the first specification: "Not guilty."
To the second specification: "Not guilty."
To the third specification: "Not guilty."
To the fourth specification: "Not guilty."
To the fifth specification: "Not guilty."
To the sixth specification: "Not guilty."
To the charge: "Not guilty."

* * * * * * *

The accused having no more evidence to offer and nothing further to say in defense, the court was cleared and closed, and after mature deliberation, on the evidence adduced, finds the accused, Captain Bird L. Fletcher, U. S. Army, retired, as follows:

Of the 1st specification: "Guilty, substituting the date 27th September, 1870, for the date 28th September, 1870, and excepting the words 'and refused,' and of the excepted words, Not guilty."

Of the second specification: "Guilty, excepting the words 'and refused,' and of the excepted words, Not guilty."

Of the third specification: "Guilty."

Of the fourth specification: "Guilty."

Of the fifth specification: "Guilty, substituting the words and figures 'twenty-six (26) dollars' for the words and figures 'eighteen (18) dollars,' and excepting the words 'and refused,' and of the excepted words, Not guilty."

13 Of the sixth specification: "Guilty."

Of the charge: "Guilty."

And the court does therefore sentence Captain Bird L. Fletcher, U. S. Army (retired), to be dismissed the service.

WAR DEPARTMENT,
July 24th, 1872.

In conformity with the 65th of the Rules and Articles of War, the proceedings of the general court-martial in the foregoing case have been forwarded to the Secretary of War for the action of the President.

The proceedings, findings, and sentence are approved, and the sentence will be duly executed.

WM. W. BELKNAP,
Secretary of War.

EXECUTIVE MANSION,
Washington, July 5, 1888.

The proceedings, findings, and sentence of the court-martial in the foregoing case of Bird L. Fletcher, captain in the U. S. Army, retired, are hereby approved.

GROVER CLEVELAND.

Reports and order of the President.

There is no evidence that the proceedings were laid before the President, and that the sentence received his approval; in other words, that the proceedings have ever been acted on as the law requires. (Runkle v. U. S., 122, U. S., 543.)

The order professing to dismiss Runkle from the Army was dated Jan. 16, 1873. On the 4th of August, 1877, President Hayes reviewed the official action theretofore taken in that case, and having caused the record to be laid before him, and having considered the same, disapproved the conviction and sentence, and revoked the order dismissing Runkle.

And upon the facts in Runkle's case, the Supreme Court held that there was no evidence of President Grant's approval, but there was evidence of President Hayes' disapproval, and that Runkle was never legally out of the service.

In Runkle's case, President Hayes reviewed the proceedings five years after the court-martial sat. He disapproved the sentence, and thereupon Runkle was restored to the status of a retired officer, and there being no vacancy in the retired list, was carried on the rolls as additional to the number of retired officers allowed by law. Fletcher also was a retired officer and held no office from which he was ousted by the nomination and confirmation of a successor. In his case there is no evidence of any action of the President at any time, and following the precedent in Runkle's case, it is still subject to the President's action, which is not barred by any statute of limitations.

The record of the trial and the original report of Judge-Advocate-General Holt, of July 23, 1872, are herewith respectfully submitted.

G. NORMAN LIEBER,
Acting Judge-Advocate-General.

WAR DEPARTMENT,
Washington City, May 18, 1888.

SIR: I have the honor to acknowledge the receipt of a copy of the record in the case of Captain Bird L. Fletcher, transmitted by your direction on April 21st for examination and report.

In reply I beg to invite attention to the report of the Acting Judge-Advocate-General, dated April 17, 1888, which contains all material facts in the case.

It appears from these facts that Captain Fletcher is still, undoubtedly, an officer of the Army, and that the proceedings of the court which tried him are now awaiting action by the President. The original record is therefore herewith transmitted, with a recommendation that the sentence be approved.

Very respectfully, your obedient servant,

WM. C. ENDICOTT,
Secretary of War.

The PRESIDENT.

EXECUTIVE MANSION,
Washington, July 5, 1888.

The proceedings, findings, and sentence of the court-martial in the foregoing case of Bird L. Fletcher, captain in the U. S. Army (retired), are hereby approved.

GROVER CLEVELAND.

14 Special Orders, No. 197.

WAR DEPARTMENT,
ADJUTANT-GENERAL'S OFFICE,
Washington, August 24, 1872.

1. A board of examination having found Captain Edward S. Meyer, 9th Cavalry, incapacitated for active service by reason of a gunshot wound received at the battle of Chancellorsville, Virginia, May 3, 1863, the President directs that his name be placed upon the list of retired officers of that class in which the disability results from long and faithful service, or from wounds or injury received in the line of duty, in conformity with sections 16 and 17 of the act of August 3, 1861.

* * * * * * *

By order of the Secretary of War:

E. D. TOWNSEND,
Adjutant-General.

WAR DEPARTMENT,
Washington City, September 2d, 1872.

SIR: You are hereby informed that the President of the United States has promoted you to the rank of captain in the Ninth Regiment of Cavalry in the service of the United States, to take effect from the twenty-fourth day of August, one thousand eight hundred and seventy-two, vice Meyer, retired from active service. Should the Senate, at the next session, advise and consent thereto, you will be commissioned accordingly.

WM. W. BELKNAP,
Secretary of War.

Captain FRANCIS MOORE,
9th Cavalry, Fort Clark, Texas.

The President of the United States of America, to all who shall see these presents, greeting:

Know ye, that, reposing special trust and confidence in the patrotism, valor, fidelity, and abilities of Francis Moore, I have nominated and, by and with the advice and consent of the Senate, do appoint him captain in the Ninth Regiment of Cavalry in the service of the United States, to rank as such from the twenty-fourth day of August, eighteen hundred and seventy-two. He is therefore carefully and diligently to discharge the duty of captain by doing and performing all manner of things thereunto belonging. And I do strictly charge and require all officers and soldiers under his command to be obedient to his orders as captain. And he is to observe and follow such orders and directions, from time to time, as he shall receive from me, or the future President of the United States of America, or the general or other superior officers set over him, according to the rules and discipline of war. This commission to continue in force dur-

ing the pleasure of the President of the United States, for the time being.

Given under my hand, at the city of Washington, this eleventh day of January, in the year of our Lord one thousand eight hundred and seventy-three, and in the ninety-seventh year of the Independence of the United States.

U. S. GRANT.

By the President:

WM. W. BELKNAP,
Secretary of War.

15 VI.—*Opinion of the court.*

NOTT, *J.*, delivered the opinion of the court:

The general principal laid down by the Supreme Court in Runkle's Case (122 U. S. R., 543) is that "in time of peace no sentence of a court-martial directing the dismissal of an officer shall be carried into execution until it shall have been confirmed by the President" (Art. War 65; 2 Stat. L., p. 359), and the confirmation being "judicial in its character" it must appear "otherwise than argumentatively" that "the whole proceedings of the court-martial had been laid before him" and that the confirmation of the sentence was "the result of his own judgment," and not a mere departmental order issued by the Secretary of War.

The trouble in this class of cases has not been with the principle but with the application of it.

The order of dismissal involved in Runkle's Case (122 U. S. R., 543), is in these words:

The findings and sentence are approved.

In view of the unanimous recommendation by the members of the court that accused shall receive Executive clemency on account of his gallant services during the war and of his former good character and in consideration of evidence by affidavits presented to the War Department since his trial showing that accused is now and was at the time when his offence was committed suffering under great infirmity in consequence of wounds received in battle; and creditable representations having been made that he would be utterly unable to pay the fine imposed, the President is pleased to remit all of the sentence except so much thereof as directs cashiering, which will be duly executed."

"WM. W. BELKNAP,
"*Secretary of War.*"

The order of dismissal involved in Page's Case (137 U. S. R., 673) is in these words:

"WAR DEPARTMENT,
"*Washington City, May 27, 1874.*

"In conformity with the Sixty-fifth of the rules and Articles of War the proceedings of the general court-martial in the foregoing case have been forwarded to the Secretary of War and by him submitted to the President.

"The sentence is approved.

"Second Lieut. Frank A. Page (retired) accordingly ceases to be an officer of the army from the date of this order.

"WM. W. BELKNAP,
"*Sec'y of War.*"

The order of dismissal involved in the present case is in these words:

"WAR DEPARTMENT, *July* 24, 1872.

"In conformity with the Sixty-fifth of the Rules and Articles of War the proceedings of the general court-martial in the foregoing case have been forwarded to the Secretary of War for the action of the President.

"The proceedings, findings, and sentence are approved, and the sentence will be duly executed.

"WM. W. BELKNAP,
"*Secretary of War.*"

It will be noted that the recitals in the last two orders are identical, until we come to their concluding words. In the former those words are "and by him submitted to the President;" in the latter they are "for the action of the President."

In the case of Runkle the Supreme Court held that the order of dismissal did not show "otherwise than argumentatively" that the proceedings of the court-martial had been laid before the President, or that the confirmation of the sentence was "the result of his own judgment," and hence it was inoperative and void.

In the case of Page the Supreme Court held that as the order did show upon its face in positive terms that the proceedings had been laid before the President, it might be inferred otherwise than argumentatively that the confirmation of the sentence was the result of his own judgment, and hence that it carried the sentence into execution and dismissed the officer from the Army.

In the present case the question is whether the order comes within the decision in Runkle or in Page.

In neither of those cases does it appear that the order of dismissal was the act of the President, much less "the result of his own judg-
16 ment." The only distinction which can be drawn between the two is that in Page's case it appears in positive terms that the proceedings of the court had been forwarded to the Secretary of War, and "by him submitted to the President;" while in Runkle's it only appears on the face of the order that "in view of the unanimous recommendation by the members of the court that accused shall receive executive clemency," and of certain other representations not a part of the proceedings of the court-martial, "the President is pleased to remit all of the sentence except so much thereof as directs cashiering, which will be executed." Consequently, the only rule which can be deduced from the two decisions is that where it appears positively on the face of the order of dismissal that the proceedings of the court-martial had been submitted to the President by the Secretary of War, it must be inferred that the subsequent approval and confirmation of the sentence, though in the name of the Secretary, was the act of the President, and the result of his own judgment.

A third element appears in the present case which was not in either of the others. It is stated in the order of dismissal that the proceedings of the court-martial had been forwarded to the Secretary of War "for the action of the President." In the case of Page it was held that if it appears from the terms of the order that the proceedings of the court had been submitted to the President by the Secretary of War it may be inferred,

not argumentatively, that the subsequent order of the Secretary dismissing the officer was the act of the President and the result of his own judgment. Can it likewise be inferred, not argumentatively, that if it appears upon the face of the order that the proceedings were forwarded to the Secretary "for the action of the President," the order in the name of the Secretary was the act of the President and the result of his own judgment?

The court can not regard the two orders as identical in legal effect. The former shows, without argument or inference, that the proceedings of the court-martial were actually laid before the President; the latter shows nothing more than that the proceedings were "forwarded to the Secretary of War" for a purpose that may never have been executed, his submitting them to the President. In the one case the record reached its official destination; in the other it may or may not. So far, therefore, the court must regard the case as ruled by the decision in Runkle, and the order of the Secretary of War as void.

But in 1888 a subsequent Secretary of War called the attention of the then President to a petition of the claimant asking that the sentence of the court-martial be set aside and that he be restored to the retired list, and to an opinion by the acting judge advocate-general stating that there was no evidence that the proceedings were ever laid before the President or that the sentence had received his approval. The Secretary of War added:

"It appears from these facts that Captain Fletcher is still undoubtedly an officer of the Army, and that the proceedings of the court which tried him are now awaiting action by the President. The original record, therefore, is herewith transmitted with a recommendation that the sentence be approved."

And thereupon the President on the 5th of July, 1888, made an order in his own name approving the proceedings, findings, and sentence.

It is now maintained by the counsel for the claimant that the charges and specifications whereof Captain Fletcher was found guilty show upon their face no offense punishable by dismissal from the Army, and that such a sentence is wholly void. The present suit is to recover pay up
17 to the present time and virtually to restore Captain Fletcher to the retired list. But it is contended by the counsel for the Government that the confirmation of the sentence by the President in 1888 related back and took effect as of the time when the proceedings reached the Secretary of War in 1883; that the President having filled the place of Captain Fletcher on the retired list by an appointment of an officer from the active list and having filled the place of that officer on the active list by an appointment, with the advice and consent of the Senate, there was a removal from office, and that the specifications set up facts which constitute the military offense of conduct unbecoming an officer and a gentleman, the punishment of which is dismissal from the Army (Art. War, 61).

There are two statutes relating to the dismissal of officers which nevertheless have different objective points. The first is that which has been quoted, the 65th Article of War (now 106 Rev. Stat., sec. 1342); the second is the act 17th July, 1866 (14 Stat. L., p. 92, sec. 5; Rev. Stat., sec. 1229), which provides that no officer in time of peace shall be dismissed from the service "except upon and in pursuance of the sentence of a court-martial to that effect or in commutation thereof."

The former statute is to be found in the "Rules and Articles" for the government of the "*The* armies of the United States" (Rev. Stat., sec. 1342), and operates upon commanding generals in the field, generals commanding military departments, and the Secretary of War, in effect taking away the authority which they once possessed and forbidding them to carry the sentence of a court-martial into execution; the latter is founded on that provision of the Constitution which invests Congress with power "to make rules for the government and regulation of the land and naval forces," and is a restriction upon the power of the commander-in-chief.

To these may be added a third law as declared by the Supreme Court in Blake's Case (103 U. S. R., 227), the authority of the President, with the advice and consent of the Senate, to remove a military or naval officer notwithstanding the restriction of the last-quoted statute, by the appointment of his successor.

The President did not assume to dismiss Captain Fletcher on his own judgment and responsibility; and the action of the President and the Senate in filling a vacancy on the active list seems to the court too remote to be accepted as the intentional dropping of an officer from the retired list. It was not the taking of a specific office from one man and giving it to another. All that the President has done or assumed to do was to give effect to the proceedings of the court-martial by the confirmation of the sentence. If there was no valid sentence of a court of competent jurisdiction there was nothing to be confirmed. We must therefore determine whether the acts set up in the specifications, of which Captain Fletcher was found guilty, constitute an offense which will sustain the charge and consequently the sentence.

It must be confessed that, in the affairs of civil life and under the rules and principles of municipal law, what we ordinarily know as fraud relates to the obtaining of a man's money, and not to refusing to pay it back. It is hard for the trained lawyer to conceive of an indictment or declaration which should allege that the defendant defrauded A or B by refusing to return to him the money which he had borrowed from him. Our legal training, the legal habit of mind, as it is termed, inclines us to dis-
18 sociate punishment from acts which the law does not define as offenses. As one of our greatest writers of fiction puts it, with metaphysical fitness and accurate sarcasm, as she describes one of her legal characters, "His moral horizon was limited by the civil code of Tennessee." That it is a fraud to obtain a man's money by dishonest representations, but not a fraud to keep it afterwards by any amount of lying and deceit, is a distinction of statutory tracing. The gambler who throws away other people's money and the spendthrift who uses it in luxurious living instead of paying it back, cheat and defraud their creditors as effectually as the knaves and sharpers who drift within the meshes of the criminal law. We learnt as law students in Blackstone that there are things which are *malum in se* and, in addition to them, things which are merely *malum prohibitum;* but unhappily in the affairs of real life we find that there are many things which are *malum in se* without likewise being *malum prohibitum.* In military life there is a higher code, termed honor, which holds its society to stricter accountability; and it is not desirable that the standard of the Army shall come down to the requirements of a criminal code. Moreover, the specifications aver in one instance that the claimant used his honorable military position to borrow money upon, and

assured his creditors of payment from the pay which the Government allows to officers on the retired list. It may or it may not be dishonorable for a man not to pay his debts; but that may depend upon how he incurred them and whether it is within his human possibilities to pay them. Certainly the Government does not give officers the respectability of rank and the support of retired pay to enable them to prey upon their fellow citizens. Remembering the honorable military record of the claimant, the court is averse to commenting upon the details of the specifications, especially as it is not at liberty to review the evidence, but at the same time can not hold that refusing to pay a debt may not be conduct unbecoming an officer and a gentleman.

The court is therefore of the opinion that when the President approved the sentence Captain Fletcher ceased to be an officer in the Army. But the court is at the same time of the opinion that the sentence did not become operative until then; and that from December 1, 1883, when the claimant was last paid, to July 5, 1888, when the sentence was confirmed by the President, Captain Fletcher is entitled to recover the pay of his rank on the retired list.

The case of Ide (25 C. Cls., 401) has been pressed upon the attention of the court by the counsel for the Government. The distinction between the two cases is this: In the former the claimant, being upon the active list, owed service to the Government which he allowed another man to perform, and his acquiesence in the action of the Secretary of War for a long period of time was an abandonment of the office, equivalent to a resignation. In the present case the claimant was exempt from service, and his pay on the retired list an honorable form of pension. That the retired list had reached its full limit by the retirement of another officer who took the claimant's place did not change his relation to the Government and was a condition of affairs with which he was not chargeable.

The judgment of the court is that the claimant recover of the defendant the sum of $9,654.

19 VII.—*Judgment of the court.*

BIRD L. FLETCHER
vs. } No. 16702.
THE UNITED STATES.

At a Court of Claims held in the city of Washington, on the 8th day of June, A. D. 1891, judgment was ordered to be entered up as follows:

The court, upon due consideration of the premises, find in favor of the claimant, and do order, adjudge, and decree that the said claimant, Bird L. Fletcher, do have and recover of and from the United States the sum of nine thousand six hundred and fifty-four dollars.

BY THE COURT.

20 VIII.—*Application for, and allowance of, appeal.*

BIRD L. FLETCHER
vs. } No. 16702.
THE UNITED STATES.

From the judgment rendered in the above-entitled cause on the 8th day of June, 1891, in favor of claimant, the defendants, by their Attorney-

General, on the 8th day of August, 1891, made application for, and give notice of, an appeal to the Supreme Court of the United States.

JOHN B. COTTON,
Assistant Attorney-General.

Filed and allowed Aug. 8, 1891, in vacation.

WILLIAM A. RICHARDSON,
Chief Justice.

21 IX.—*Application of claimant for and allowance of, appeal.*

BIRD L. FLETCHER
v.
THE UNITED STATES. } No. 16702.

From the judgment rendered in the above-entitled cause on the 8th day of June, 1891, in favor of the claimant for the sum of nine thousand six hundred and fifty-four dollars ($9,654), and no more, the claimant, Bird L. Fletcher, by his attorney of record, George A. King, on this 14th day of August, in the year 1891, makes application for, and gives notice of, an appeal to the Supreme Court of the United States.

GEO. A. KING,
Attorney for Claimant.

Filed and allowed in vacation, August 14, 1891.

WILLIAM A. RICHARDSON,
Chief Justice.

22 X.—IN THE COURT OF CLAIMS.

BIRD L. FLETCHER
vs.
THE UNITED STATES. } No. 16702.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the findings of fact by the court and the conclusions of law thereon, of the opinion of the court, of the judgment of the court, of the application of the defendants for, and the allowance of, appeal to the Supreme Court of the United States, of the application of the claimant for, and allowance of, appeal to the said Supreme Court.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Washington this 15th day of August, 1891.

[SEAL.]

JOHN RANDOLPH,
Asst. Clerk, Court of Claims.

(Indorsed on cover:) No. 918. The United States, appellant, vs. Bird L. Fletcher; and No. 919. Bird L. Fletcher, appellant, vs. The United States. Court of Claims. Filed September 18, 1891. Supreme Court U. S., clerk's office. Received Sep. 18, 1891.

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148 U.S. 584

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FILED.
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JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States.

OCTOBER TERM, 1892.

THE UNITED STATES, APPELLANT,
vs.
BIRD L. FLETCHER. } No. 918.

BIRD L. FLETCHER, APPELLANT,
vs.
THE UNITED STATES. } No. 919.

APPEALS FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

A. X. PARKER,
Assistant Attorney-General.

In the Supreme Court of the United States.

OCTOBER TERM, 1892.

THE UNITED STATES, APPELLANT, *vs.* BIRD L. FLETCHER. } No. 918.

BIRD L. FLETCHER, APPELLANT, *vs.* THE UNITED STATES. } No. 919.

APPEALS FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT.

In this case the claimant, Bird L. Fletcher, by his amended petition, filed in the Court of Claims December 16, 1890, sets forth that the United States is indebted to him in the

sum of $14,700, which he is entitled to receive as a captain of the United States Army, retired, from the 1st day of December, 1883, to the 30th day of November, 1890, being $2,100 per year for seven years. (Rec., pp. 1 to 3.)

Bird L. Fletcher enlisted December 27, 1859, and became captain August 25, 1867.

Previous to June 19, 1868, claimant had performed meritorious service in the Army, and on that day he was placed upon the list of retired officers (4) in that class in which the disability results from long and faithful service or from some injury incident thereto.

In July, 1872, he was tried by a court-martial upon a charge and specifications and was found guilty, and was sentenced to be dismissed from the service.

The proceedings were forwarded under Article 65 for further action.

The order of dismissal is in these words:

> WAR DEPARTMENT, *July* 24, 1872.
>
> In conformity with the Sixty-fifth of the Rules and Articles of War the proceedings of the general court-martial in the foregoing case have been forwarded to the Secretary of War for the action of the President.
>
> The proceedings, findings, and sentence are approved, and the sentence will be duly executed.
>
> WM. W. BELKNAP,
> *Secretary of War.*

Claimant received no pay after said month, and did not dispute at the War Department the validity of his dismissal, and made no appeal to the President, but did apply to Congress for redress and restoration.

After the decision by this court in May, 1887, of the case of *Runkle* v. *The United States* (122 U. S., 543), and March 1, 1888, he made application for pay. (P. 6.)

April 17, 1888, the Acting Judge-Advocate-General made report that Fletcher was still a captain on the retired list of the Army. (9.)

On May 18 the Secretary of War made a similar report to the President, who, under date of July 5, 1888, approved the proceedings, findings, and sentence of the court-martial of 1872.

This suit was brought for the pay which the claimant would, at the date of the commencement thereof, have been entitled to if he had never been removed from the retired list or dismissed the service.

The court gave him judgment for $9,654, being pay from December 1, 1883, when the statute of limitations began to run, to July 5, 1888.

The United States appeals to this court upon the ground that claimant is entitled to no judgment in his favor.

The claimant appeals upon the ground that he is, in fact, still a retired officer of the Army, that the court-martial proceedings were void, and that each of the approvals was invalid and without effect, and that he is entitled to pay for the period since July 5, 1888, as well as for the previous period.

Such further statements and details as are of consequence will be presented in connection with the argument of the case. The trial below is reported (26 C. Cls. R., 541).

STATUTES AND ARTICLES.

By the act of April 10, 1802 (2 Stat., 367), article 65, the law relating to dismissals like those under consideration was declared to be as follows:

> But no sentence of a court-martial shall be carried into execution until after the whole proceedings shall have been laid before the officer ordering the same, or the officer commanding the troops for the time being; neither shall any sentence of a general court-martial, in time of peace, extending to the loss of life, or the dismission of a commissioned officer, or which shall, either in time of peace or war, respect a general officer, be carried into execution until after the whole proceedings shall have been transmitted to the Secretary of War, to be laid before the President of the United States for his confirmation or disapproval and orders in the case.

By the act of May 29, 1830 (4 Stat., 417), entitled "An act to alter and amend the sixty-fifth article," etc., it is directed that when the accuser is a superior officer of the accused, in the cases stated, the court-martial shall be appointed by the President.

The concluding sections of said act are as follows:

> SEC. 2. *And be it further enacted*, That the proceedings and sentence of the said court shall be sent directly to the Secretary of War, to be by him laid before the President for his confirmation, or approval, or orders in the case.
>
> SEC. 3. *And be it further enacted*, That so much of the sixty-fifth article of the first section of "An act for establishing rules and articles for the government of the armies of the United States," passed on the tenth of April, eighteen hundred and six, as is repugnant hereto be, and the same is hereby, repealed.

Article 72 of section 1342, R. S., reads thus:

> ART. 72. Any general officer, commanding the Army of the United States, a separate army, or a separate department, shall be competent to appoint a general court-martial, either in time of peace or in time of war. But when any such commander is the accuser or prosecutor of any officer under his command, the court shall be appointed by the President, and its proceedings and sentence shall be sent directly to the Secretary of War, by whom they shall be laid before the President, for his approval or orders in the case.

And article 106 of this section reads:

> ART. 106. In time of peace no sentence of a court-martial, directing the dismissal of an officer, shall be carried into execution until it shall have been confirmed by the President.

It is recognized that the law as stated in the Revised Statutes was arranged and expressed since the court-martial involved, but it may be proper to make some reference to these later declarations.

By the Articles of War, as enacted in 1806, it is provided (2 Stat. 369):

> ART. 83. Any commissioned officer convicted before a general court-martial of conduct unbecoming an officer and a gentleman, shall be dismissed the service.

The corresponding rule as set forth in the Revised Statutes reads thus:

> ART. 61. Any officer who is convicted of conduct unbecoming an officer and a gentleman shall be dismissed from the service.

ASSIGNMENTS OF ERROR.

1. The Court of Claims erred in adjudging and decreeing that the claimant, Bird L. Fletcher, recover of and from the United States the sum of $9,654.

2. The court erred in not giving judgment in defendant's favor.

3. The court erred in holding that the claimant remained an officer in the Army (retired) after July, 1872.

4. The court erred in holding and deciding that the order of approval and dismissal bearing date July 24, 1872, and signed, Wm. W. Belknap, Secretary of War, was invalid and without effect, and erred in not holding said document to be valid and effectual.

5. The court erred in holding that the claimant remained an officer of the Army (retired) after his place had been filled by the retirement of Capt. Meyer, and after the promotion of First Lieut. Moore, as set forth in the eighth of the findings of fact.

POINTS.

I.

BIRD L. FLETCHER CEASED TO BE AN OFFICER OF THE ARMY JULY 24, 1872.

A.

The charge made against Capt. Fletcher was "Conduct unbecoming an officer and a gentleman." There were six specifications.

The accused appeared before the court martial and pleaded "Not guilty" as to each specification and as to the charge.

The court heard the case; whereupon, "The accused having no more evidence to offer and nothing further to say in defense" (p. 8), the court found the accused guilty, as the court sets forth, as to each specification and as to the charge (p. 8), and the court sentenced the accused "To be dismissed the service."

The proceedings and sentence were transmitted to the Secretary of War.

(Finding of Fact No. III.)

It may not be material whether "The whole proceedings" were "transmitted to the Secretary of War, to be laid before the President for his confirmation or disapproval, and orders in the case," under the phraseology of Article 65 as enacted in 1806; or whether "The proceedings and sentence" were "sent directly to the Secretary of War, to be by him laid before the President for his confirmation, or approval, or orders in the case," under the wording of the act of 1830. In either case the proceedings were sent by virtue of the statute which commanded their transmission for the sole purpose of placing them before the *President for his action.*

The presumption which assumes or argues that the proceedings were transmitted for the approval of the Secretary of War, upon his individual or independent judgment, or that the confirmation, approval, or orders in the case were not those of the President, is without foundation or justification.

The action following this statutory transmittal is shown by the following document (folios 10 and 13):

WAR DEPARTMENT,
July 24, 1872.

In conformity with the sixty-fifth of the Rules and Articles of War, the proceedings of the general court-martial in the foregoing case have been forwarded to the Secretary of War for the action of the President.

The proceedings, findings, and sentence are approved, and the sentence will be duly executed.

WM. W. BELKNAP,
Secretary of War.

This document must be read in the light of the statute and of the practice of the Departments. The proceedings were sent under article 65; their sending did not call for a review by, or for any confirmation or orders from, the Secretary individually; they were merely forwarded to him for the expressed purpose of enabling him to lay them before the President, so that the President might take action as directed by statute.

The necessary inference of the law is that each officer performed his duty.

There is no statement that the Secretary assumed the prerogative of his official superior and confirmed or approved or ordered, and an inference that he did so is unauthorized.

The statement made by Secretary Belknap is not only terse but it leaves something to be supplied, and here lies such ambiguity as may exist.

He has the requirements of article 65 in mind; the statement that the proceed'ngs are forwarded to him is a

statement that they were received by him, and not only that, but that he received them "*for the action of the President.*" It is little less than charging stultification to say that, having thus received the proceedings for such a purpose, he thereupon proceeded himself to make his own study of these proceedings and to make his own approval and issue his own order.

The second sentence of the document, the expression of the executive action which the article vested in the President, is:

> The proceedings, findings, and sentence are approved, and the sentence will be duly executed.

Are approved by whom? By the President, beyond all question.

There is no word in the document or in the facts as found which gives to the claimant the right to assume that the President did not or that the Secretary did perform the act of approval.

"The proceedings and sentence are approved." How approved? The answer must be, approved in accordance with law, approved in conformity with rule 65, therefore approved by the President.

It is plain that the Secretary recognized the binding force and the special requirements of the Article. All action in the premises was in acknowledged obedience to it. It must be held, therefore, that the approval was by the President and that the order for the execution of the sentence was by him also.

There is nothing new or singular in the fact that the document is signed by the Secretary, and not by the Pres-

dent in his own name. When the executive officer named in the article has examined, considered, and determined the case submitted to him, it is of no account that his conclusions are announced through the Secretary.

But it is claimed by the claimant that it is not shown that the President did consider and determine the case.

It necessarily follows from the terms of the document that the proceedings were duly forwarded to the Secretary to be laid before the President, that they were laid before the President, and that he approved of the findings and sentence.

It is therefore submitted that the calling up and the attempted reconsideration of the case upon the suggestion of the Acting Judge-Advocate-General by the War Department in 1888 (p. 9), after sixteen years of practical acquiescence, was not justified by a correct construction of this document of July 24, 1872, and is of no effect.

In this connection the seventh finding of fact of the Court of Claims is significant, viz:

> Claimant did not dispute at the War Department the validity of his dismissal July 24, 1872, in pursuance of the sentence of the court-martial, for a period of nearly sixteen years, but did promptly petition Congress for redress and urge his restoration to the retired list. He made application for pay to the accounting officers of the Treasury after March 1, 1888.

B.

Under finding VII, and the long-continued acquiescence in the conclusion announced by the President's Secretary of War (which conclusion must have been understood to

have been the act of the President under Article 65, when it was promulgated and for many years thereafter), the claimant is estopped from now claiming that the approval published was not the act of the President.

If the claimant actually contended or suspected that the President had not approved the proceedings, findings and sentence, he should have appealed to the President. The then President remained in office until March 4, 1877.

As claimant remained silent then, he should remain silent now.

It is probable that in 1888 the President adopted the recommendation of his Secretary of War without question, and that the Secretary accepted the suggestion of the Acting Judge-Advocate in a similar manner, and it is submitted that this learned gentleman was carried too far by the force of the opinion in the Runkle case.

It should certainly require a very strong and a very clear case to justify a reopening, a review of and a reraling upon a matter that all those concerned in had for this long period understood to be settled, and had treated as lawfully determined. (See Ide's Case, 25 C. Cls. R., 401.)

It will be noted that finding VII shows that claimant made no application for any pay from the date of the document of 1872 until after March, 1888, and the fact there stated that he "did promptly petition Congress for redress and urge his restoration to the retired list" is conclusive that he recognized that he had been actually (legally) taken from that list, and that he knew that the approval set forth in the document was the act of the President.

It will scarcely do to say that in 1872 neither the President nor the Secretary of War nor their legal advisers nor the claimant nor his legal advisers comprehended the statute which was before them.

All treated the document of July 24 as conclusive.

C.

On the part of the United States it is admitted on the one hand and claimed on the other that this question must be determined in accordance with Runkle's case, *supra*, or with Page's case (137 U. S., 673), and that the decision will depend upon the construction of the document of approval.

For convenient inspection the three documents appearing in the three cases (entire, or so far as they relate to the question at issue) are given below.

IN RUKLE'S CASE (122 U. S., 547).

> The proceedings in the foregoing case of Maj. Benjamin P. Runkle, retired, U. S. Army, are approved, with the exception of the action of the court in rejecting as evidence, etc. * * *
>
> The findings and sentence are approved. In view of the unanimous recommendation, etc., * * * and of his former character, and in consideration of evidence by affidavits presented, etc., * * * the President is pleased to remit all of the sentence, except so much thereof as directs cashiering, which will be duly executed.
>
> WM. W. BELKNAP,
> *Secretary of War.*

IN PAGE'S CASE (137 U. S., 677).

WAR DEPARTMENT,
Washington City, May 27, 1874.

In conformity with the sixty-fifth of the Rules and Articles of War, the proceedings of the general court-martial to the foregoing case have been forwarded to the Secretary of War and by him submitted to the President.

The proceedings and the findings upon the second charge and specification and upon the third charge under its second and third specifications are approved.

* * * * *

The sentence is approved.

Second Lieut. Frank A. Page (retired) accordingly ceases to be an officer of the Army from the date of this order.

WM. W. BELKNAP,
Secretary of War.

IN FLETCHER'S CASE.

WAR DEPARTMENT,
July 24, 1872.

In conformity with the sixty-fifth of the Rules and Articles of War, the proceedings of the general court-martial in the foregoing case have been forwarded to the Secretary of War for the action of the President.

The proceedings, findings, and sentence are approved, and the sentence will be duly executed.

WM. W. BELKNAP,
Secretary of War.

In Runkle's Case the President is not mentioned in the clause or portion of the document which the court says relates to the approval of the court-martial proceedings,

but only in that portion of the document which is said to resemble a pardon, while in Page's Case and in Fletcher's he is explicitly named in connection with the court-martial proceedings, in the first clause and before the allegation of approval.

In Runkle's Case there is no reference to the sixty-fifth article, while in each of the other two cases the document asserts the action taken to be "in conformity with the sixty-fifth of the Rules and Articles of War."

If in conformity with the sixty-fifth rule the proceedings must have been transmitted to the Secretary, to be laid before the President, for his confirmation or disapproval, and orders; in each of these two cases it is admitted that action on the part of the President is prescribed, it is recognized by the words used that the approval must be by him, and then, immediately following, the approval is distinctly and explicitly asserted.

It is true that in Page's Case it is stated in terms that the proceedings were forwarded to the Secretary of War, "and by him submitted to the President;" while in Fletcher's Case it is only asserted that the "proceedings of the general court-martial * * * have been forwarded to the Secretary * * * for the action of the President," and that "the proceedings, findings and sentence are approved."

It would border upon burlesque, if such a thing could be imagined in such relations, to construe this document as making the Secretary say:

> In conformity with article 65 the proceedings in this case have been forwarded to me for the action of the President. I have approved them myself—and the sentence will be duly executed.

But this would be disregarding the phraseology of the document as well as lampooning the Secretary.

In this case as in Page's the only possible conclusion to be drawn from the statement contained in the document is that the approval was by the President, in whom alone was reposed the authority to act.

It is the doctrine of Runkle's case that the approval or disapproval must be the result of the judgment of the President himself, and that it must be authenticated in a way otherwise than argumentatively that the action taken is that of the President. Runkle's case goes to the very verge of the law.

It being held that manual signing by the President is not required, it is submitted that Fletcher's case practically complies with the rule in Runkle's case.

The allegations that the action is under the sixty-fifth article, that the proceedings came to the signer of the document for the President's approval, and that the approval (under rule 65) has been made, and that the sentence will be executed, comprise a sufficient statement that the President has approved.

The reference to the sixty-fifth rule and the forwarding expressly for the action of the President discriminate this case from Runkle's and disprove the theory that the approval was understood to be a mere departmental order issued by the Secretary of War.

The question now under consideration is very nearly the same as that before this court in Page's case (137 U. S., 673).

Mr. Chief Justice Fuller, delivering the opinion of the court in that case, says (678):

> Undoubtedly the action required of the President under this article is judicial action. He decides personally, and the judgment is his own personal judgment, and not an official act presumptively his. But that judgment need not be attested by his sign manual in order to be effectual. This was so held by Attorney-General Wirt (2 Opinions Attys. Gen., 67), Attorney-General Cushing (7 Opinions Attys. Gen., 473), and Attorney-General Devens (15 Opinions Attys. Gen., 290); and in the opinion of the latter numerous instances of the attestation of the President's determination by the Secretary of War are given.

After considering paragraph 896 of the Army Regulations of 1863, the opinion continues (pp. 679, 680):

> And the Attorney-General concludes that: "In the case of the confirmation of a sentence of dismissal by a court-martial, no formality appears to be prescribed by law for attesting the determination of the President; and as, in cases of that sor , the attestation of such determination by a written statement, signed by the Secretary of War, is in accordance with long usage, that mode of attesting the President's action, confirming a sentence of dismissal, is to be considered as sufficient" (p. 295). We are satisfied that this view is correct.
>
> Since, therefore, it appeared by the order of the Secretary of War, written upon the record of the court-martial in controversy, that the proceedings had "been forwarded to the Secretary of War, and by him submitted to the President," and that the proceedings and findings upon certain charges and specifications were approved, and that the sentence

was approved, the only possible conclusion to be drawn from such statement is that the approval was by the President, in whom alone was reposed the authority to act. The Secretary of War declared that he had submitted the proceedings in conformity with the sixty-fifth of the Rules and Articles of War, and the sixty-fifth article required the whole proceedings to be laid before the President for his confirmation or disapproval and orders in the case. By what process of reasoning can the conclusion be justified that although these proceedings were laid before the President for his confirmation or disapproval, yet the findings and sentence were approved by some one else, who had no authority to act in the premises? On the contrary, where the record discloses that the proceedings have been laid before the President for his orders in the case, the orders subsequently issued thereon are presumed to be his, and not those of the Secretary by whom they are authenticated; and this must be the result here where the approval follows the submission in the same order.

II.

THE FINDINGS AND CONCLUSIONS OF THE COURT-MARTIAL ARE SUFFICIENT AND THEY AUTHORIZE THE SENTENCE.

By Finding of Fact II, the charges and specifications of the court-martial are made part of the findings in the Court of Claims.

The charge is, "Conduct unbecoming an officer and a gentleman."

(*a*) It is submitted, first, that this court will look into the proceedings of the court-martial no further than to see that the sentence is authorized by law.

(*b*) It is assumed that under the statute and the regulations the finally approved conclusion of that court as to what acts constitute "conduct unbecoming an officer and a gentleman" will be accepted by this court.

(*c*.) It is submitted that the findings of guilty as to the first five specifications (Rec., p. 8) authorize and support the sentence.

(*d*.) The sixth specification charges that claimant did, in Paducah, Ky., February 5, 1872, borrow $30, representing that he needed it in addition to the sum he had on hand to purchase the stock and fixtures of a hotel, promising, on the honor of an officer and gentleman, to repay at the end of the month, or as soon thereafter as he got his pay from the paymaster; that claimant never completed the transaction for which the money was loaned; that he did not repay the money at any time, although often requested to do so; that he made false and deceiving statements about his pay; and that about ten days before claimant left Paducah he promised the creditor that he would not leave without paying the debt or giving security to do so, and that the claimant did not fulfill this promise, but left the place without notice to or settlement with the creditor (pp. 7, 8).

The element of fraud lies upon the surface of this specification, and the fact that Fletcher was an officer of the Army, entitled to regular pay, was used by him to obtain money, which his subsequent acts indicate that he did not intend to repay when he obtained it.

The court-martial found the claimant guilty.

It is not necessary to argue that a court-martial has the right to say by its finding that these acts constitute conduct unbecoming an officer and a gentleman.

We can not look into the testimony, as that is excluded. (Rev. Stat., sec. 708 and Rule 1 thereunder.)

That the claimant is before this court without any standing to permit him to question the jurisdiction of the court-martial, or the sufficiency of the charge, or of this specification, or to contend that the sentence is not fully justified and supported by the specifications and the findings, will be submitted to this court without further comment. (See Op. Rec., fol. 18.)

III.

THE CLAIMANT WAS DULY SUPERSEDED BY THE PROCEEDINGS SET FORTH IN THE EIGHTH OF THE FINDINGS OF FACT.

The eighth finding of fact is as follows:

VIII.

When Capt. Fletcher was dismissed the service as an officer on the retired list by sentence of a court-martial, the retired list being limited to 300 (R. S., 1258, and references), was filled to its maximum in the following manner:

On the 24th of August, 1872, Capt. Edward S. Meyer, Seventh Cavalry, was retired to fill vacancy. The vacancy caused by the retirement of Capt. Meyer was filled, by and with the consent of the Senate, by the promotion of First Lieut. Francis Moore to be captain Ninth Cavalry from August 24, 1872.

The question is respectfully submitted whether, under this finding, Bird L. Fletcher was not removed from office under the doctrine of *Blake's case* (103 U. S., 227, 237), *Keyes' Case* (109 U. S., 336), and *Mullan's case* (140 U. S., 240, 245).

It is respectfully submitted that the judgment of the Court of Claims should be reversed.

A. X. PARKER,
Assistant Attorney-General.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1892.

NOS. 918 AND 919.

THE UNITED STATES, Appellant,

v.

BIRD L. FLETCHER.

BIRD L. FLETCHER, Appellant,

v.

THE UNITED STATES.

Brief of GEORGE A. KING,
for BIRD L. FLETCHER,
Appellee in No. 918,
Appellant in No. 919.

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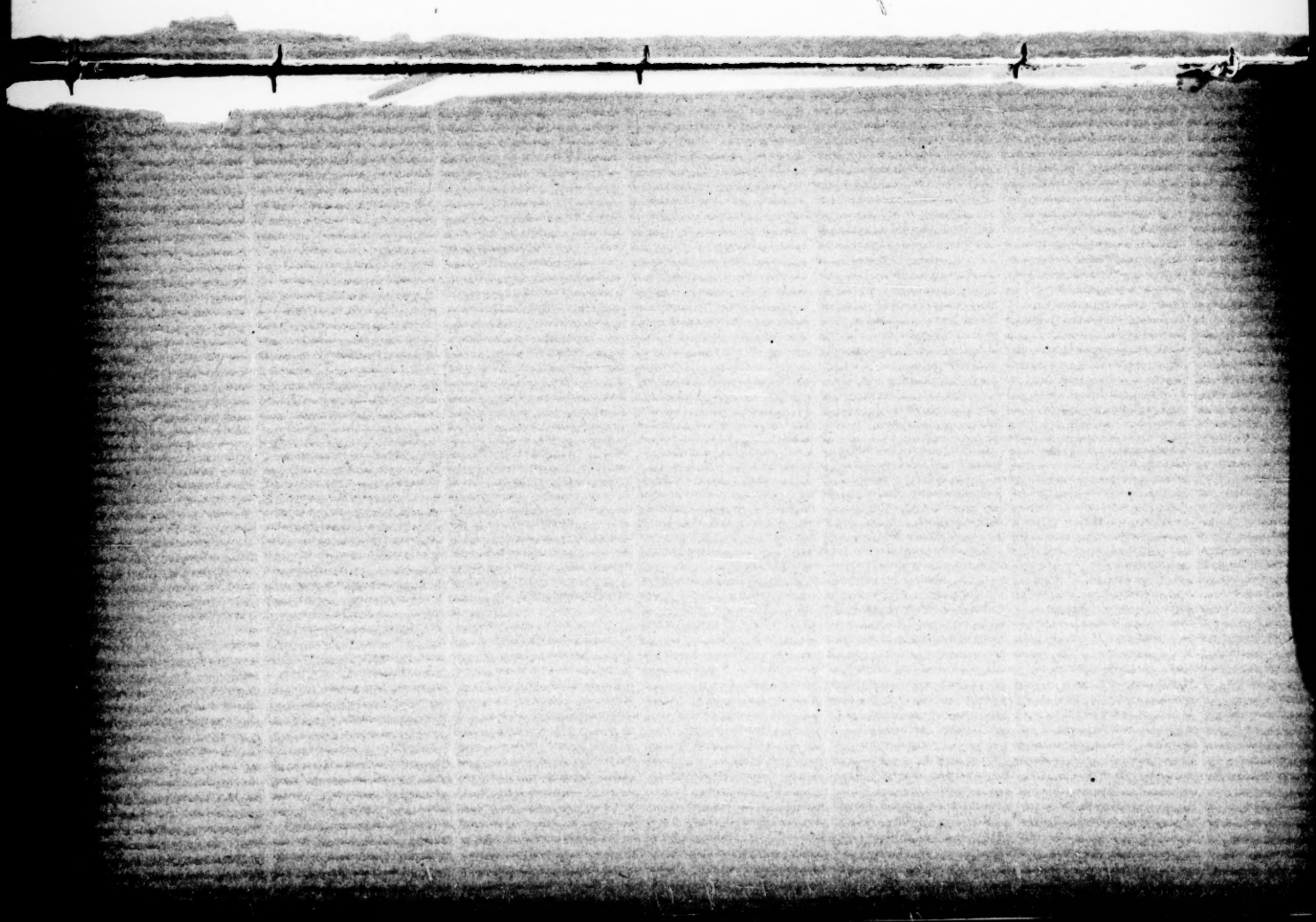

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1892.

THE UNITED STATES, Appellant,
v.
BIRD L. FLETCHER. } No. 918.

BIRD L. FLETCHER, Appellant,
v.
THE UNITED STATES. } No. 919.

Brief for Bird L. Fletcher.

I. Statement of the Case.

1. Military Record.

This is a suit brought by Bird L. Fletcher for arrears of pay as Captain on the retired list of the regular Army, and involves the validity of the proceedings and sentence of a court-martial, dismissing him from the service of the United States.

The facts as found by the Court of Claims, are as follows:

On December 27, 1859, the claimant was enlisted as a private in the regular Army, and so remained until he was promoted to corporal, January 23, 1863.

He was next promoted February 24, 1863, to second lieutenant. He was brevetted first lieutenant, May 10, 1863, for gallant and meritorious service in the cavalry action at Franklin, Tennessee

He was promoted to first lieutenant, October 12, 1864.

He was promoted to captain, August 25, 1867.

On the 19th of June, 1868, he was retired from active service and placed on the retired list of the army by direction of the President, upon the report of a board of examination, which found him "Incapacitated for active service, and that said incapacity is the result of sickness and exposure incident to the service." The order retiring him directed "That his name be placed upon the list of retired officers of that class in which the disability results from long and faithful service, or from some injury incident thereto, in accordance with Section 16 of the act approved August 3, 1861," 12 Stat. 287, 289. (Finding I, Record, p. 4.)

2. Trial and Sentence.

On the 10th of July, 1872, he was brought to trial before a general court-martial, at Philadelphia, Pa. (Finding II, p. 4.)

The charge and specifications were as follows (pp. 6–8):

"CHARGE.—Conduct unbecoming an officer and a gentleman.

"*Specification 1.*—In this, that he, Captain Bird L. Fletcher, U. S. Army (retired), having, with promise of payment as soon as he received his pay due him from the paymaster, become justly indebted to H. S. Wagner, merchant, of Stroudsburg, Pa., in the sum of one hundred (100) dollars for supplies and various articles of merchandise furnished him by the said Wagner, in the said borough, at various dates between the 10th May and the 4th June, 1870, has, with the exception of the sum of twenty-five (25) dollars paid on account on the 28th September, 1870, up to the present time, without just cause and with intent to defraud, continuously failed, neglected, and refused to pay the said Wagner the amount of said indebtedness although repeatedly requested by the said Wagner to do so about and subsequent to the 1st August, 1870.

"*Specification II.*—In this, that he, Captain Bird L. Fletcher, U. S. Army (retired), having, with promise of payment at the expiration of a month, become justly indebted to Joseph Wallace, merchant, of Stroudsburg, Pa., in the sum of fifty-five (55) dollars and ten (10) cents for supplies and various articles of merchandise furnished by the said Wallace to the said Fletcher, in the said borough, at various dates between the 28th September and the 2d November, 1870, has, up to the present time, without just cause and with intent to defraud, failed, neglected, and refused to pay the said Wallace the amount due him, or any part or portion thereof, though repeatedly requested by the said Wallace to do so on and subsequent to the 2d November, 1870.

"*Specification III.*—In this, that he, Captain Bird L. Fletcher, U. S. Army (retired), having, with promise of speedy payment, become justly indebted to Messrs. R. F. and H. D. Bush, merchants, of Stroudsburg, Pa., in the sum of sixty-two (62) dollars and fifty-one (51) cents for various articles of merchandise furnished him by the said firm, in the said borough, at various times between April 14 and November 2d, 1870, has, with the exception of forty (40) dollars and seventy-five (75) cents paid on account on June 17th, 1870, and August 30th, 1870, up to the present time and without just cause and with intent to defraud, failed, neglected, and refused to pay the said firm the amount due them, although frequently requested by the members of the said firm to do so at different dates subsequent to the 1st July, 1870.

"*Specification IV.*—In this, that he, Captain Bird L. Fletcher, U. S. Army (retired), having, with promise of speedy payment, become justly indebted to Simon Fried, merchant, of Stroudsburg, Pa., in the sum of twenty-eight (28) dollars for various articles of merchandise furnished him by the said Fried, in the said borough, at various times between September 10th and November 16th, 1870, has, with the exception of the sum of ten (10) dollars paid on account on 31st October, 1870, up to the present time, without just cause and with intent to defraud, failed and neglected to pay the said Fried the amount of said indebtedness, although repeatedly requested to do so by

the said Fried about and subsequent to November 16th, 1870.

"*Specification V.*—In this, that he, Captain Bird L. Fletcher, U. S. Army (retired), having, with promise of speedy payment, become justly indebted to J. Ingraham Allender, proprietor 'Stroudsburg House,' Stroudsburg, Pa., in the sum of forty-two (42) dollars, for board between certain days in the months of March and May, 1870, has, with the exception of eighteen (18) dollars paid on account up to the present time, without just cause and with intent to defraud, continuously failed, neglected, and refused to pay the said Allender the amount of said indebtedness, although frequently requested by the said Allender to do so at different dates subsequent to the 1st July, 1870.

"*Specification VI.*—In this, that he, Captain Bird L. Fletcher, U. S. Army (retired), did, in the city of Paducah, Kentucky, on the 5th February, 1872, borrow the sum of thirty (30) dollars from Edward Baker, assessor internal revenue, 1st district Kentucky, representing that he (Fletcher) needed that sum in addition to the sum he had on hand to purchase the stock and fixtures of the Cumberland House of Paducah, Kentucky, which he (Fletcher) had an opportunity to buy, and promising, on the honor of an officer and gentleman, to repay the said loan at the end of the month in which it was made, or as soon thereafter as he (Fletcher) got his pay from the paymaster; and, notwithstanding, the said Fletcher never completed the transaction for which the money was loaned; the said Fletcher did not return the said amount of money to the said Baker at the time, nor has he (Fletcher) at any time repaid him the said amount, although repeatedly requested to do so by the said Baker at different dates, from a day or a few days after the contraction of the said debt until on or about the 6th June, 1872, when the said Fletcher left the city of Paducah; and, moreover, that the replies made by said Fletcher to the said Baker whenever asked by him to pay the said debt, which replies were to the effect that his (Fletcher's) pay was stopped by authority until certain accounts should be adjusted, were false and calculated to deceive the said Baker;

and further, that about ten (10) days previous to the said Fletcher leaving Paducah, Kentucky, as stated above, he promised the said Baker he would not leave without paying the debt in question, or giving security to do so, which promise was never fulfilled, the said Fletcher leaving Paducah, Kentucky, without notification to or settlement with the said Baker.

"This on and about the dates and at the places specified above."

With reference to the alleged false representations, referred to in the last specification, as to the stoppage of the claimant's pay till certain accounts should be adjusted, the Court of Claims finds the following facts:

"By orders from the Headquarters of the Army, dated September 14, 1869, the claimant's pay was stopped on account of some unsettled balances claimed to be due from him on account of subsistence fund stores, and property funds and stores, and other disallowances made by authority in his accounts.

"By further order dated January 13, 1870, the former order was so modified as to allow the claimant to draw his pay for September and October, 1869.

"On June 15, 1870, the balance claimed on said accounts was stated by orders at two hundred and thirty-seven dollars and sixty-four cents ($237.64), and that amount was stopped from the pay of Captain Fletcher, the claimant."

(Finding V, p. 5.)

The claimant managed his own case in person before said court-martial, and was not represented by counsel. (Finding II, p. 4.)

To the charge and all the specifications he pleaded "Not Guilty" (p. 8).

The findings and sentence were as follows (p. 8):

"Of the 1st specification: 'Guilty, substituting the date 27th September, 1870, for the date 28th September, 1870,

and excepting the words 'and refused,' and of the excepted words, 'Not Guilty.'

"Of the second specification: 'Guilty, excepting the words 'and refused,' and of the excepted words, 'Not Guilty.'

"Of the third specification: 'Guilty.'

"Of the fourth specification: 'Guilty.'

"Of the fifth specification: 'Guilty, substituting the words and figures 'twenty-six (26) dollars' for the words and figures 'eighteen (18) dollars,' and excepting the words 'and refused,' and of the excepted words, 'Not Guilty.'

"Of the sixth specification: 'Guilty.'

"Of the charge: 'Guilty.'

"And the court does therefore sentence Captain Bird L. Fletcher, U. S. Army (retired), *to be dismissed the service.*"

3. Approval of Sentence, etc.

The proceedings, findings, and sentence were transmitted to the Secretary of War, who wrote upon the record the following order, viz:

"WAR DEPARTMENT,
"*July 24th, 1872.*

"In conformity with the 65th of the Rules and Articles of War, the proceedings of the general court-martial in the foregoing case have been forwarded to the Secretary of War for the action of the President.

"The proceedings, findings, and sentence are approved, and the sentence will be duly executed.

"WM. W. BELKNAP,
"*Secretary of War.*"

From the date of this order the claimant has received no pay as an officer of the Army. (Finding III, p. 5.)

Claimant did not dispute at the War Department the validity of his dismissal July 24, 1872, in pursuance of the sentence of the court-martial, for a period of nearly

sixteen years, but did promptly petition Congress for redress and urge his restoration to the retired list. He made application for pay to the accounting officers of the Treasury after March 1, 1888. (Finding VII, p. 6.)

The Judge-Advocate-General of the Army, having, in 1888, reported to the Secretary of War that "in his [Captain Fletcher's] case there is no evidence of any action by the President at any time, and, following the precedent in Runkle's case, it is still subject to the President's action, which is not barred by any statute of limitations"; and the Secretary of War having thereupon informed the President "that Captain Fletcher is still undoubtedly an officer of the Army, and that the proceedings of the court which tried him are now awaiting action by the President," the President, on July 5, 1888, made an order that "the proceedings, findings, and sentence of the court-martial in the foregoing case of Bird L. Fletcher, captain in the United States Army (retired), are hereby approved." (Finding IV, p. 5.)

The reports and orders above referred to are annexed to and form part of the findings of the Court of Claims (pp. 9, 10).

4. Filling the Vacancy.

When Captain Fletcher was dismissed the service as an officer on the retired list by sentence of a court-martial, the retired list being limited to 300 (R. S., 1258, and references), was filled to its maximum in the following manner:

On the 24th of August, 1872, Capt. Edward S. Meyer, Seventh Cavalry, was retired to fill vacancy. The vacancy caused by the retirement of Captain Meyer was filled by and with the consent of the Senate by the promotion of First Lieut. Francis Moore to be captain Ninth Cavalry from August 24, 1872. (Finding VIII, p. 6.)

The order retiring Captain Meyer, the letter informing Lieutenant Moore of his promotion, and the commission of Moore as captain are all set out *in extenso* in the Record (pp. 10, 11). None of them contain any reference to the claimant, Fletcher.

5. Proceedings in the Court of Claims.

The suit was instituted in the Court of Claims December 11, 1889, and an amended petition filed December 16, 1890 (p. 1).

It is therein claimed (p. 2)—

"that the proceedings, findings, and sentence of said court-martial, together with the approval thereof by the Secretary of War in 1872, and by the President of the United States in 1888, were and are wholly null and void for the following reasons:

"1. Because said court-martial acted wholly in violation of law in trying and convicting the claimant on a charge and specifications stating no offence whatever within any of the articles of war.

"2. Because, as to the order of the Secretary of War in 1872, the same was not the act of the President of the United States, by whom alone, under the 106th (formerly 65th) of the Articles of War such a sentence can be confirmed."

The Court of Claims, by its opinion (pp. 11–15) delivered by Judge Nott, June 8, 1891, ruled *against* the former, but *in favor* of the latter of these propositions. It therefore allowed the claimant pay from December 1,* 1883 (all back of that date being barred by limitation) to the date of President Cleveland's order approving the proceedings of the court-martial, July 5, 1888, and gave judgment in his favor for $9,654 (p. 15).

From that judgment both parties appealed (pp. 15, 16)

* The Army is by law paid monthly, and the pay for December, 1883 was therefore not due till the last day of that month. Rev. Stat. § 1268.

II. Assignment of Error.

The claimant, Bird L. Fletcher, hereby assigns the following error in the ruling and judgment of the Court of Claims:

That the said court held that the proceedings, findings and sentence of the general court-martial, which tried said Bird L. Fletcher, captain United States Army (retired), and sentenced him to be dismissed the service, were valid and legal, and that "When the President approved the sentence, Captain Fletcher ceased to be an officer in the Army," and granted judgment for no more than the sum of nine thousand six hundred and fifty-four dollars ($9,654);

Whereas, said court should have held that said Captain Fletcher was never charged with or convicted of any offense whatever, within any Rules and Articles of War, or known to the military law and custom of the United States; and that there was, therefore, no jurisdiction in said court-martial to try or sentence said Fletcher, and nothing for the President of the United States to confirm, and that the said Fletcher has never ceased to be an officer in the Army, and should have granted him judgment for the entire amount claimed in his amended petition, to wit: fourteen thousand seven hundred dollars ($14,700), being the amount of the pay of a captain of the U. S. Army (retired) from the 1st day of December, in the year 1883, to the 30th day of November, 1890, a period of seven years.

Wherefore, the claimant prays that the judgment of said Court of Claims for $9,654, be affirmed, with directions to said Court of Claims to make an additional allowance of five thousand and forty-six dollars ($5,046); and that the cause be remanded to the said Court of Claims for that purpose.

III. Brief of Argument.

1. The Court-Martial without Jurisdiction.

The court-martial which tried Captain Fletcher proceeded on a charge and specifications wholly void in law, charging him with no offense, either military or civil, and was, therefore, without power or jurisdiction to try or sentence him.

The attention of this court is, therefore, invited to the character of the charge as affecting the jurisdiction of the court-martial.

The form in which an officer of the Army is accused before a court-martial, consists of what is called "a charge," followed by one or more "specifications." The "charge" is merely the general title of the offense, and serves only the general purpose of informing the accused what Article of War he is alleged to have violated. The particulars of the accusation are contained in the "specifications," which may be one or many in number; each "specification" stating some one act which the accused is alleged to have done, and constituting an offense of the description named in the charge. 3 Greenleaf on Evidence, § 472. In this case the charge is "Conduct unbecoming an officer and a gentleman," and of this charge it is readily admitted a court-martial would have jurisdiction as being a violation of the 83d (now 61st) Article of War, which provided that—

"Any commissioned officer who is convicted before a general court-martial of conduct unbecoming an officer and a gentleman, shall be dismissed the service." (2 Stat. 369; Rev. Stat. § 1342, Art. 61.)

Whether, however, an offense within the Article of War is charged, can not be determined alone by the title given by the pleader under the general description of the charge, but must be settled by a reference to the speci-

fications. A court-martial could not, under the charge of "Conduct unbecoming an officer and a gentleman," try an officer on specifications alleging that he was a Buddhist, or entertained views different from those of the constituted authorities on the silver question, any more than a civil court would have jurisdiction to try a citizen where the indictment, though formally entitled as a charge of murder, should show that the person assaulted had not died, or that the victim was not a human being. The jurisdiction of every tribunal is always liable to be re-examined collaterally in every court in which its judgments are drawn in question. More especially must this be so with courts-martial, composed, as they are, of judges whose habits and modes of thought have but ill-fitted them for the calm and impartial examination of questions of guilt or innocence, whose decisions are subject to no appeal, and some of whose actions have been recently too truly characterized by a high authority in the following vigorous language:

"If some of the proceedings of courts-martial which I have had occasion to examine present the ideas of justice which generally prevail in these tribunals, I am satisfied that they should be much reformed if the honor and honesty of the Army and Navy are by their instrumentality to be vindicated and protected." (President Cleveland, cited in House Report No. 1074, 52d Congress, 1st Session.)

Surely it can not be admitted that it can be left to these military tribunals, of all others, to define conclusively the limits of their jurisdiction, to say what persons and what offenses shall be subject to their cognizance, to decide without appeal or review that a certain person or certain act is of that military character which can alone be the subject of a "case arising in the land or naval

forces," within the true constitutional meaning of those terms.

With the view of ascertaining then whether the specifications charged Captain Fletcher with any offense against the Articles of War, we beg the attention of the court to an examination of their contents. In the first specification he is accused as follows:

"In this, that he, Capt. Bird L. Fletcher, U. S. Army (retired), having, with promise of payment as soon as he received his pay due him from the paymaster, become justly indebted to H. S. Wagner, merchant, of Stroudsburg, Pa., in the sum of $100 for supplies and various articles of merchandize furnished him by the said Wagner, in the said borough, at various dates between the 10th of May and 4th of June, 1870, has, with the exception of the sum of $25 paid on account on the 28th September, 1870, up to the present time, without just cause and with intent to defraud, continuously failed, neglected, and refused to pay the said Wagner the amount of said indebtedness, although repeatedly requested by the said Wagner to do so about and subsequent to the 1st August, 1870."

On this specification the finding of the court-martial was as follows:

"Guilty, substituting the date 27th September, 1870, for the date 28th September, 1870, and excepting the words, 'and refused,' and of the excepted words not guilty."

This finding takes the very life out of the charge, which was of a refusal to pay a contract debt, making the whole conviction nothing more than of a simple neglect to discharge, in full, a pecuniary indebtedness. We say *in full*, as the specification shows on its face an honest attempt to liquidate the obligation by part payment. But

with what did the specification, even as originally drawn, charge the accused? Its omissions are more remarkable than its allegations. Not the slightest averment of having obtained credit under false or unfounded pretenses,—no breach of trust in the transaction,—not even an allegation that he was pecuniarily able to discharge the indebtedness. Indeed, the contrary of the last idea suggests itself from the fact that the order retiring the claimant discloses the fact of his ill health, as it recites that his incapacity for active service "is the result of sickness and exposure incident to the service."

The military authorities on this Article of War are numerous. No one of them, however, admits mere nonpayment of indebtedness as a ground for a charge. All agree that some element of fraud, bad faith, breach of trust, deceit or other dishonorable conduct is a necessary ingredient of the offense. Merely to make a promise to pay money and then break it is a mere breach of contract, often as not the result of misfortune, to which no culpability whatever can be attached. Even, however, if it arises from carelessness or extravagance, it does not attain the gravity of a crime or offense against the law, either military or civil. The heavy obligations in which officers of the British army sometimes become involved, beyond their ability to pay, is so notorious as to need only a reference to hundreds of works of English fiction, from Thackeray down through the list, where it forms a frequent topic of romance. Never, however, either in fictitious or real history, has it been supposed to form sufficient ground for bringing the officer to trial by court-martial.

The Article of War in question is borrowed from those of the British service, and has been in force in that country and this almost ever since there has been a standing army in either. It has, therefore, received a well-

settled construction. That construction is that to constitute an offense under it, the conduct must be unbecoming, not merely to the character of an officer, or merely to that of a gentleman, but unbecoming an officer *and* a gentleman in both capacities. It must be such grave official misconduct as is inconsistent with the character of a gentleman, which all officers in an honorable service should maintain; or, on the other hand, it must be in his character as a gentleman such a scandalous breach of honesty and decency as seriously compromises his position as an officer, and renders him an unfit associate for his brethren of the service. As for slight breaches of gentlemanly decorum, they can only be visited in the case of an officer, as in that of a civil person, with social censure.

The British official "Manual of Military Law" (1887 edition) provides: "Scandalous conduct may be either of a military or social character. But a charge of a social character is not to be preferred under this section, unless it is of so grave a nature as to render the officer unfit to remain in the service, and therefore is scandalous in respect of his military character." See also Simmons on Courts-Martial, 7th ed., §§ 158, 159, 840–842; Hough's Precedents in Military Law, 237–240; Samuel on Military Law, 645–652.

In *Grant* v. *Gould*, 2 H. Bl. 69, — a case often cited as an authority favorable to the powers of courts-martial,— Lord Loughborough, referring (p. 99) to martial law, as in force "in those States which subsist by military power," but in England "was contrary to the Constitution, and which has been for a century totally exploded," remarks:

"Where martial law prevails, the authority, under which it is exercised, claims a jurisdiction over all military persons, in all circumstances. Even their debts are subject to inquiry by military authority; every species of offense, committed by any person who appertains to the Army is

tried, not by a civil judicature, but by the judicature of the regiment or corps to which he belongs."

Then, contrasting (pp. 99, 100):

"In this country, all the delinquencies of soldiers are not triable, as in most countries in Europe, by martial law; but where they are ordinary offenses against the civil peace, they are tried by the common-law courts."

And again (pp. 100, 101):

"The object of the mutiny act, therefore, is to create a court invested with authority to try those who are a part of the army in all their different descriptions of officers and soldiers; and the object of the trial is limited to breaches of military duty. Even by that extensive power granted by the Legislature to his Majesty to make articles of war, those articles are to be for the better government of his forces, and can extend no further than they are thought necessary to the regularity and due discipline of the army."

Nothing could better mark the distinction between an arbitrary government and a constitutional one than the fact that under the former "even the debts" of officers and soldiers are a subject of cognizance by military courts, while under the latter, their jurisdiction is "limited to breaches of military duty."

DeHart's Military Law, a reliable American authority, after discussing this Article of War, concludes (p. 377)—

"Thus a charge of unofficer-like and ungentlemanly conduct, when divested of all tendency to affect good order and military discipline, and at the same time involving no moral turpitude of such a kind as would reflect discredit upon the military community, can not be deemed cognizable by a military court."

Mr. Greenleaf enumerates a number of subjects of pleas to the jurisdiction of courts-martial, one of which is "that the offense is purely of civil and not of military

cognizance" (3 Greenleaf on Evidence, § 473). What can be more purely of civil cognizance than a complaint of non-payment of private debts?

A ruling having a direct and important bearing on the present case was made in 1881. An officer was charged with "conduct unbecoming an officer and a gentleman." The first specification set out that the accused, having remained for a long period—nearly five years—justly indebted to a post-trader in a certain sum, and having been repeatedly, but vainly, requested by the creditor to settle, finally wrote him, July 6, 1880, that he would pay him in full not later than October 1, 1880, which promise he wholly failed to fulfill, "though receiving the full pay of a captain retired, and being *abundantly able to pay said amount*" (an allegation not contained in any of the specifications against Fletcher). By the second specification it was charged that having become indebted to a certain person he pledged his word as a officer and a gentleman to one of the majors of his regiment that if he (said major) would become responsible for the debt, he would presently liquidate the same; but wholly failed for three years to pay the debt, and neglected to answer inquiries made of him respecting the same, through the Adjutant General's Office.

He was also charged with "conduct to the prejudice of good order and military discipline," by three specifications, alleging a failure to respond to communications from the Secretary of War, demanding an explanation of his conduct.

He was found guilty of the charges, and sentenced "to be dismissed from the service." The President, however, made the following order:

"OFFICE OF THE PRESIDENT OF THE UNITED STATES,

"*December* 13, 1881.

"The sentence in the foregoing case of Captain James Egan (retired) is not confirmed, for the reason that the

element of *fraud, essential to bring the failure to liquidate indebtedness within the purview of the charge* of 'conduct unbecoming an officer and a gentleman,' is not found to have been established by proof.

"CHESTER A. ARTHUR."

General Court-Martial Order No. 70, 1881.

This ruling of the President is in accordance with the views of all respectable authors on military law. Even Winthrop, who gives as wide a scope to this article as any writer known to us, after citing the cases under this article of "Dishonorable neglect to discharge pecuniary obligations," adds in a note:

"Some such culpable and *dishonorable* circumstances should characterize the transaction to make it a proper basis for a military charge. A mere failure to settle a private debt (which may be more the result of misfortune than of fault), can not of course properly become the subject of trial and punishment at military law."

1 Winthrop, Military Law, 1024, 1027.

The second specification is like in form. It charges the accused with having with promise of payment after expiration of a month, become indebted to Joseph Wallace, merchant of Stroudsburg, Pennsylvania, in the sum of $55.10 for supplies and merchandise, and yet failed, neglected, and refused to pay the amount due, or any part or portion thereof, etc. The finding on this specification was "Guilty, excepting the words 'and refused,' and of the excepted words not guilty." Here again the whole life—so far as it had any—of the charge was taken out by the omission of the words "and refused," leaving the offence simply that of having neglected to pay an ordinary mercantile debt.

The third specification charges the accused with having with promise of speedy payment become justly indebted to Messrs. R. F. and H. D. Bush, merchants, in

the sum of $62.51 for merchandise furnished, and yet having neglected and refused to pay the amount due, with the exception of $40.75, although frequently requested, etc. On this the finding was "Guilty"; in other words, under this specification the claimant was found guilty of the grave offence of having contracted a grocery bill of $62.51, and up to the time of trial paid only $40.75 on it, leaving due a balance of $21.76! This is what this court-martial chose to call by the name of "conduct unbecoming an officer and a gentleman."

The fourth specification was that Capt. Fletcher, having, with promise of speedy payment, become justly indebted to Simon Fried, merchant, in the sum of $28 for merchandise, failed and neglected to pay said Fried the amount of said indebtedness with the exception of $10 paid on account. Here it will be observed only *neglect* —not refusal—to pay was charged. On this specification the accused was found guilty.

The fifth specification charged the accused with having become indebted with promise of speedy payment to the proprietor of the Stroudsburg House, Stroudsburg, Pa., in the sum of $42 for board between certain dates in the months of March and May, 1870, yet having without just cause, and with intent to defraud, continuously neglected and refused to pay said proprietor, with the exception of $18 paid on account. This would leave $24 as the amount due, but the finding was "Guilty, substituting the words and figures 'twenty-six dollars, ($26)' for the words and figures 'eighteen dollars, ($18)' and excepting the words 'and refused,' and of the excepted words not guilty." Thus the accused was found innocent of refusal to pay, and guilty of a mere neglect to pay a trifling balance of $16!

It should here be added that in these five specifications it is charged that these various neglects and refusals to

pay were "without just cause, and with intent to defraud." These words add nothing to the force of the facts alleged. Insufficient allegations are not helped out by decorating them with vituperative epithets. As the law, strictly speaking, recognizes no just cause for the failure to pay a debt, these words mean no more than that he failed or refused to pay the debt, though due. The phraseology is almost exactly what would have been adopted if the pleader had been drawing a declaration in *assumpsit* for goods sold and delivered, where, no matter in what entire good faith the defendant had resisted payment, it would have been alleged that "the said C. D., not regarding his said promise and undertaking, but contriving and *fraudulently intending craftily and subtilly to deceive and defraud* the said A. B. in this behalf, has not yet paid the said sum of money, or any part thereof to the said A. B., although oftentimes afterwards requested," etc. (Tyler's Stephen on Pleading, pp, 72, 73.)

The sixth specification is as follows:

"In this, that he, Capt. Bird L. Fletcher, U. S. Army (retired), did, in the city of Paducah, Kentucky, on the 5th February, 1872, borrow the sum of thirty (30) dollars from Edward Baker, assessor internal revenue, 1st district Kentucky, representing that he (Fletcher) needed that sum in addition to the sum he had on hand to purchase the stock and fixtures of the Cumberland House, of Paducah, Kentucky, which he (Fletcher) had an opportunity to buy, and promising, on the honor of an officer and gentleman to repay the said loan at the end of the month in which it was made, or as soon thereafter as he (Fletcher) got his pay from the paymaster; and, notwithstanding, the said Fletcher never completed the transaction for which the money was loaned, the said Fletcher did not return the said amount of money to the said Baker at the time, nor has he (Fletcher) at any time repaid him the said amount, although repeatedly requested to do so by the said Baker at different dates, from

a day or a few days after the contraction of the said debt until on or about the 6th June, 1872, when the said Fletcher left the city of Paducah; and, moreover, that the replies made by said Fletcher to the said Baker whenever asked by him to pay the said debt, which replies were to the effect that his (Fletcher's) pay was stopped by authority until certain accounts should be adjusted, were false, and calculated to deceive the said Baker; and further, that, about ten (10) days previous to the said Fletcher leaving Paducah, Kentucky, as stated above, he promised the said Baker he would not leave without paying the debt in question, or giving security to do so, which promise was never fulfilled, the said Fletcher leaving Paducah, Kentucky, without notification to or settlement with the said Baker.

"This on and about the dates and at the places specified above."

Now, what does all this amount to? Simply this, that the accused borrowed $30 from a man in Paducah, Kentucky, in order in part to enable him to buy the stock and fixtures of a hotel at that place, and promised to pay it back again at the end of the month, or as soon as he got his pay. The trade in question was not completed, accused renewed his promise to pay, and said he would not leave the city without paying or giving security, yet he left without notifying or settling with his creditor, and when asked to pay replied that his (Fletcher's) pay was stopped by authority until certain accounts should be adjusted, which reply was false.

Notwithstanding the greater detail given of this transaction, it differs in no material respect from any of the preceding. It is simply a transaction of loan, where the others were of purchase or of board. The accuser has gone only one step further in adding an allegation of false excuse for non-payment. This is the only other material averment, for the court will hardly feel disposed to give serious attention to the breach of the promise not

to leave Paducah until settlement. The promise not to leave without paying was, in fact, nothing more than a promise to pay before he left. The failure to comply with this promise was just like the failure to pay in the other cases—a simple breach of contract. Surely this officer was not a prisoner in the city until such time as his creditor should give him leave to depart.

Is this specification, however, helped out by the further allegation "that the replies made by the said Fletcher to the said Baker whenever asked to pay the said debt, which replies were to the effect that his (said Fletcher's) pay was stopped by authority until certain accounts could be adjusted, were false and calculated to deceive said Baker"? By no means. Is it possible that at the time of this trial the United States Army had attained to a state of such extreme virtue that a *single unfounded allegation* by an officer to escape the pressing demands of a persistent creditor constituted that grave offense, to which the 61st Article of War attaches the penalty of *dishonorable dismissal from the service?* The crime denounced by this article surely amounts to a far graver misconduct than a single act of untruth.

It can not be admitted, however, that even this single untruth was uttered. It is found in distinct terms (Finding V, p. 5) that Captain Fletcher's pay *was* stopped September 14, 1869, on account of some unsettled balances claimed to be due from him on account of subsistence funds and stores, and property funds and stores, and other disallowances made by authority in his accounts; that by further order dated January 13, 1870, the former order was so modified as to allow him to draw his pay for September and October, 1869; and that on June 15, 1870, the balance was stated by orders at $237.64, and that amount stopped from his pay. These items of charge constituted *unsettled claims against the United States,* and

until adjusted there was no untruth in stating that his pay "was stopped by authority until certain accounts should be adjusted"—perhaps not all his pay, but a considerable part.

In finding the facts thus set forth in Finding V, the Court of Claims has not undertaken to impeach the record of this officer's conviction by parol testimony, in violation of the rule of law on that subject. It has simply set one record against another, all the facts in regard to the stoppage of the pay being of official record, conclusively showing the frivolity of the charge against the officer, and the malice which must have inspired it.

And even could the sixth specification by any liberality of construction be upheld, what respect could be attributed to conviction and sentence based upon charges, *five-sixths* of which were clearly beyond the jurisdiction of the court? To frame a plausible argument for sustaining a sentence based upon proceedings one part valid and five parts void, would require considerable ingenuity in the arithmetic of jurisdiction.

Here, too, let it be observed, that there was no charge made against this officer of being an habitual non-payer of his debts, or what is vulgarly but forcibly known as a "dead-beat." The charge was based on non-payment of six specific debts, and by that and that alone the proceedings of the court-martial must stand or fall.

The time has gone by when debtors could be treated as criminals. The pen of Dickens familiarized the world with the horrors of the debtors' prison in England, and led the way to the abolition of imprisonment for life as the practical result of inability to pay debts. We do not now even permit debtors to be insulted by postal-cards or envelopes which publish their delinquency to the world. Act Sept. 26, 1888, 1 Supp. to Rev. Stat. (2d ed.) 621; *United States* v. *Bayle*, 40 Fed. Rep. 664; *United States* v.

Brown, 43 Fed. Rep. 135. This high court, though strict in the construction of that clause of the Constitution which forbids the States passing laws impairing the obligation of contracts, has held that a State law abolishing imprisonment for debt has not the prohibited effect. *Penniman's Case*, 103 U. S. 714. And Mr. Justice Swayne, pronouncing the opinion of the court in *Edwards* v. *Kearzey*, 96 U. S. 595, 602, makes the following remarks, which strong as they are, are none too forcible for the subject:

"Imprisonment for debt is a relic of ancient barbarism. It has descended with the stream of time. It is a punishment rather than a remedy. It is right for fraud, but wrong for misfortune. It breaks the spirit of the honest debtor, destroys his credit, which is a form of capital, and dooms him, while it lasts, to helpless idleness. Where there is no fraud it is the opposite of a remedy. Every right-minded man must rejoice when such a blot is removed from the statute-book."

It was, indeed, suggested on behalf of the defense in this case that it was for the court-martial to decide conclusively whether the acts charged constituted "conduct unbecoming an officer and a gentleman," and that its decision on that question is not reviewable by this court. This view makes the court-martial the judge of its own powers—an idea abhorrent to every notion of civil liberty, and which would put every officer of the Army at the mercy of unscrupulous and tyrannical superiors in the most private and secret unofficial relations of life. Under such a doctrine it would be possible, and not far from probable, that at certain times and under certain circumstances, inquisitions might be instituted into the political, social, and even religious, relations of the officers of the Army, and even into such of their opinions and beliefs as might be obnoxious to the ruling powers. The doctrine is not only objectionable in principle, but wholly

unsupported by authority. Courts-martial are courts of limited and special jurisdiction. And it is essential to their validity that it should be affirmatively shown that they acted upon a case clearly within their jurisdiction, and that their proceedings were strictly regular. No presumption can be indulged in favor of the validity of the judgment of such a court; and its judgment is everywhere treated as a *nullity*, unless the record affirmatively shows both jurisdiction and regularity of proceeding. (3 Greenleaf on Evidence, § 470; *Duffield* v. *Smith*, 3 S. & R. 590; *Brooks* v. *Adams*, 11 Pick. 441; *Mills* v. *Martin*, 19 Johns. 7.)

"A court-martial organized under the laws of the United States is a court of special and limited jurisdiction. It is called into existence for a special purpose and to perform a particular duty. When the object of its creation has been accomplished it is dissolved. 3 Greenl. Ev. § 470; *Brooks* v. *Adams*, 11 Pick. 441, 442; *Mills* v. *Martin*, *supra*; *Duffield* v. *Smith*, 3 S. & R. 590, 599. Such also is the effect of the decision of this court in *Wise* v. *Withers*, 3 Cranch, 331, which, according to the interpretation given it by Chief Justice Marshall, in *ex parte Watkins*, 3 Pet. 193, 207, ranked a court-martial as 'one of those inferior courts of limited jurisdiction whose judgments may be questioned collaterally.' To give effect to its sentences it must appear affirmatively and unequivocally that the court was legally constituted; that it had jurisdiction; that all the statutory regulations governing its proceedings had been complied with, and that its sentence was conformable to law. *Dynes* v. *Hoover*, 20 How. 65, 80; *Mills* v. *Martin*, 19 Johns. 33. There are no presumptions in its favor so far as these matters are concerned. As to them, the rule announced by Chief Justice Marshall in *Brown* v. *Keene*, 8 Pet. 112, 115, in respect to averments of jurisdiction in the courts of the United States, applies. His language is: 'The decisions of this court require that averment of jurisdiction shall be positive; that the declaration shall state expressly the

fact on which jurisdiction depends. It is not sufficient that jurisdiction may be inferred argumentatively from its averments.' All this is equally true of the proceedings of courts-martial. Their authority is statutory, and the statute under which they proceed must be followed throughout. The facts necessary to show their jurisdiction and that their sentences were conformable to law must be stated positively; and it is not enough that they may be inferred argumentatively."

Runkle v. *United States*, 122 U. S. 555, 556.

Even in regard to civil courts it is not true in the unqualified language in which the proposition is sometimes stated that their acts can be sustained wherever they had jurisdiction over the person and the subject-matter. A court must in such a case proceed according to the law of its being and must not transcend its powers as defined by law, or its judgments will not be upheld. *Ex parte Lange*, 18 Wall. 163; *Thompson* v. *Whitman*, 18 Wall. 457; *Windsor* v. *McVeigh*, 93 U. S. 274, 282, 283. The question in this case is whether the *power* of this court-martial extended to sentencing this officer at all for the acts with which he was charged in the specifications. The court *tried* an action of debt and *sentenced* the defendant to be dismissed from the service.

As Mr. Justice Denison, concurring with Lord Mansfield, said in a similar case:

"This is nothing more than an action upon the case turned into an indictment. It is a *private breach of contract*." *Rex* v. *Wheatly*, 2 Burr. 1125, 1128.

Could it ever have been contemplated in the enactment of this Article of War as possible that a court-martial could try an officer for the simple non-payment of debts, or for any other trifling matter of that nature? Two facts, we think, will amply demonstrate that this question must be answered in the negative.

1. The gravity of the crime mentioned in this article is indicated by the penalty imposed upon it. The mandate of the law is peremptory. The sentence can be neither more nor less than dismissal from the service; and it has many times been ruled that a sentence which either falls short of or exceeds that prescribed by the Article of War is void. The conduct contemplated is such as to render it impossible in the eye of the law military for the officer longer to be permitted to associate with gentlemen of honor, such as his associates are or should be.

2. The approval of the sentence of dismissal is placed by the Articles of War on precisely the same footing as a sentence of death.

By article 105, "No sentence of a court-martial inflicting the punishment of death shall be carried into execution until it shall have been confirmed by the President," —with an exception of certain cases occurring in time of war. And by article 106, "In time of peace no sentence of a court-martial directing the dismissal of an officer shall be carried into execution until it shall have been confirmed by the President."

Again, too, Articles 111, 112, and 121 couple the punishment of death with that of dismissal of an officer, thus putting the two upon precisely the same footing. The reason is plain. Dismissal to an officer is the height of dishonor. To an officer of bravery and honor, death would be preferable to such a mark of infamy. And it is this mark which it is seriously contended that this court-martial had a right to affix forever to this gallant officer for a simple failure to defray about two hundred dollars of trifling indebtedness against him! To show the miserable puerility of this whole proceeding, we beg leave to summarize as follows the indebtedness for failing to meet which Captain Fletcher was dismissed:

Payment neglected, viz.:	
Specification 1	$75 00
" 2	55 10
" 4	18 00
" 5	16 00
" 6	30 00
Total	$194 10
Payment refused, viz.:	
Specification 3	21 76
Total of all	$215 86

This soldier asks this court whether it is for offenses such as these that four commissions won by gallant service on the battlefield can be wrested from him, that he can be turned upon the world in broken health, discredited by his Government for all civil preferment, and that his name be handed down, together with his broken sword, blackened and dishonored to his posterity? Not if there are any boundaries whatever to the power of military tribunals!

It may be suggested that there was no plea to the jurisdiction before the court-martial which tried this officer. But it will be seen by the Record (Finding II, p. 4) that he managed his own case in person, and was not represented by counsel, and under these circumstances, it could not be expected that a soldier with commissions won amidst fire and blood on a battlefield during the years when other men are attending school or college should be versed in the niceties of special pleading as laid down in the works of Chitty or Stephen. Consent can never confer jurisdiction even in case of default, much less when the party attends, and, to the best of his ability, contests the proceedings against him. The objection to these proceedings goes deeper than any mere question of

form or procedure. It is vital and fundamental,—consists in an entire want of power or authority over the subject,—and hence no question of form can have the smallest influence in the determination of the question now before the court.

In General Hull's case the court, referring to the charge of treason preferred against the accused, expresses the opinion that a court-martial can not acquire jurisdiction of the offense by the waiver or consent of the accused. Even a plea of guilty can not do away with any such radical defect as the absence of jurisdiction of the offense or the person, much less can the plea of not guilty. (1 Winthrop, Military Law, 387.) This court has, indeed, itself suggested that an officer deprived of office by sentence of a court-martial "can sue for his pay, and have the question of the jurisdiction of the court which made such an order inquired into in that suit." (*Wales* v. *Whitney*, 114 U. S. 564, 575.)

Our views on this subject are supported by an able report made to the Senate from the Committee on Military Affairs by Hon. John A. Logan, being Senate Report No. 146, 46th Congress, 2d Session, on the case of Capt. Dunbar R. Ransom, who, like the claimant in the present case, was sentenced to be dismissed the service of the United States for "conduct unbecoming an officer and a gentleman," such conduct consisting wholly in neglecting to discharge his pecuniary obligations. The committee say on that point:

"The committee are of opinion, after carefully examining all the evidence adduced, that the court erred in its findings *as well as the law of the case*. The evidence adduced on the trial, as disclosed by the transcript of the proceedings of the court, now before the committee, shows that Captain Ransom was, at the time he borrowed the money, under orders from his superiors to proceed to Fort

Laramie, then Dakota, and that he made the loan for the purpose of defraying his expenses in obeying that order. It is also shown that he gave Sanborn his promissory note for the sum borrowed, payable on demand with interest at six per cent. From the whole evidence adduced on the trial, the transaction was one of *purely a private nature between individuals competent in all respects*, though one was an officer and the other a private. There is no evidence even tending to show that Ransom *practiced any fraud or deceit in obtaining the loan*, nor is there any circumstance attending the negotiation of the loan from which the slightest inference can be drawn that Captain Ransom had any other intention than that of repaying the money borrowed when called upon; indeed, that is not charged.

"Your committee are not aware that it is a crime, in either civil or military life, for a debtor who has contracted, honestly and in good faith, a debt which, by reason of misfortune, unforeseen accident, or mistaken business management, he fails to pay at the appointed time; certainly not such as to incur so severe a penalty as that inflicted upon Captain Ransom in this case."

This report was reiterated during the present Congress by Hon. Redfield Proctor, late Secretary of War, now Senator from Vermont, who adds, in language which might be adopted in the present case as applicable:

"In the old days when persons were imprisoned for debt, and Fleet-Street prison was crowded full to overflowing, no person then suffered greater punishment than has been imposed upon Capt. Ransom by the court-martial which blighted a career which had been brilliant and full of promise." (Senate Report No. 480, 52d Congress, 1st Session.)

The bill restoring Capt. Ransom to the retired list of the army under this report passed the Senate without opposition and without division. (Congressional Record, 52d Congress, 1st Session, daily edition, p. 4255.)

In the House two favorable reports were made from the Committee on Military Affairs, one on the House bill,

the other on the Senate bill, and the reports made in the Senate adopted by that Committee. (House Reports Nos. 950, 1766, 52d Congress, 1st Session.) No action has yet been taken by the House.

Having now submitted our own views, a proper respect for the learned court below requires some comment upon its opinion.

As we have before stated, the ruling of the Court of Claims was adverse to the claimant on this branch of the case, but that conclusion was apparently reached with some reluctance and hesitation. It is thus very fairly stated in the opinion of the court, (p. 15):

"Remembering the honorable military record of the claimant, the court is averse to commenting upon the details of the specifications, especially as it is not at liberty to review the evidence, but at the same time can not hold that refusing to pay a debt may not be conduct unbecoming an officer and a gentleman."

The honorable military record of the claimant is, indeed, a prominent feature of the case, and can not be ignored in any treatment of it. Had that record been broken or tarnished by a single act of unmilitary conduct, and the claimant had been put on his trial for that breach and convicted of it, then unquestionably the conviction would be final and conclusive in all other courts and tribunals, military and civil, and he would be entitled to no redress in this or any other proceeding. But surely there is a glaring inconsistency in admitting a clear and untarnished record for bravery and other qualities going to make up the perfect soldier, and then sustaining a conviction wherein there is no breath of impeachment of that military character.

But the court goes further and admits (p. 14) that both "in the affairs of civil life and under the rules and principles of municipal law what we ordinarily know as

fraud relates to the obtaining of a man's money, and not to refusing to pay it back." The court even admits that "it is hard for the trained lawyer to conceive of an indictment or declaration which should allege that the defendant defrauded A or B by refusing to return to him the money which he had borrowed from him."

Has the term "fraud," then, such a different meaning in the Army from what it has either in law or in the affairs of civil life?

Some light may perhaps be thrown on this subject by considering the course of decisions relating to the discharge of debtors in bankruptcy and the exception of debts created by default or embezzlement of the bankrupt. In *Hennequin* v. *Clews*, 111 U. S. 676, the decisions both in this country and in England were reviewed, and it was held that a mere breach of contract, such as the hypothecation by a creditor to secure a debt from himself of securities that had been pledged to him by his own debtor, was not such a fraud as was excepted from the discharge under the bankrupt act; just as it had been held in *Neal* v. *Clark*, 95 U. S. 704, that even the commission of waste by an executor did not involve such bad faith or immorality as to bring it within the exception.

These decisions are perhaps, however, not so strong in their bearing on the present case as those of the English courts, which take a much stricter view on that subject, and regard many transactions as frauds or breaches of trust under their statutes, which we do not hold to be such under our bankrupt act. An agent failing to pay over monies collected for his principal, was held guilty of fraud; so was a son who had had the management of his father's farm and sold part of the stock and received the proceeds, and after his father's death failed to pay over the money when ordered to do so; and Lord Hatherly, as reported in

Hennequin v. *Clews*, 111 U. S. 683, says that "the exceptions (in the Debtor's Act) are referable, not to debts payable *simpliciter*, but to debts contracted in a manner in some degree subject to observation as being worthy of being treated with punishment. In every case we find some shade of misconduct; something of the character of delinquency, though varying in description."

It seems difficult indeed to frame a stricter rule as to fraud, bad faith, or immorality in failing to pay over money than that which the courts of England have thus adopted under their bankrupt laws; yet even the severest standard would fall far short of touching this case. In the case at bar Fletcher, to be lawfully tried and convicted, must have been accused, not merely of fraud, bad faith and immorality. It was necessary, in order to give the court-martial jurisdiction of him, that he should be charged with some absolute *crime*. The Court of Claims indeed adds that "it is not desirable that the standard of the Army shall come down to the requirements of a criminal code." That the Articles of War are more strict in their requirements than the rules of law governing persons in civil life, there is no doubt, and unquestionably many acts are by them made offenses, to be punished as such, which, in a civil person, could not be treated by the criminal law. It can not be, however, that the commission of an act wholly dissociated with the military character of the officer, and which in civil life would not rise to the dignity of fraud, bad faith or immorality, may, when committed by such officer, rise to a positive *crime*, which could authorize a court-martial to brand him for life with the ignominy of a disgraceful dismissal.

The lack of definiteness in this Article of War, does not warrant the idea that a court-martial is at liberty to declare *any* act to be "conduct unbecoming an officer and a gentleman." There can be no crime without a legal

definition. The remarks of Mr. Justice Woodbury, in *Luther* v. *Borden*, 7 How. 61, though contained in a dissenting opinion, were not controverted in that case, or elsewhere, to our knowledge.

"The Articles of War, likewise, are not only authorized by permanent rather than temporary legislation, but they are prepared by or under it with punishments and rules before promulgated, and known and assented to by those few who are subject to them, as operating under established legal principles, and the customary military law of modern times. 1 East, 306, 313; *Pain* v. *Willard*, 12 Wheat. 539, and also 19; 1 MacArthur, Courts-Martial, 13 and 215. They are also definite in the extent of authority under them, as to subject-matter as well as persons, as they regulate and restrain within more safe limits the jurisdiction to be used, and recognize and respect the civil rights of those not subject to it, and even of those who are, in all other matters than what are military and placed under military cognizance. 2 Stephen on Laws of England, 602; 9 Bac. Abr., Soldier F.; Tytler on Military Law, 119. And as a further proof how rigidly the civil power requires the military to confine even the modified code martial to the military, and to what are strictly military matters, it can not, without liability to a private suit in the judicial tribunals, be exercised on a soldier himself for a cause not military, or over which the officer had no right to order him; as, for example, to attend school instruction, or pay an assessment towards it out of his wages. 4 Taunt. 67; 4 Maule & Selw. 400; 2 Hen. Bl. 103, 537; 3 Cranch, 337; 7 Johns. 96."

Feeling, perhaps, the weakness of the argument in this respect, the Court of Claims proceeds:

"Moreover, the specifications aver in one instance that the claimant used his honorable military position to borrow money upon, and assured his creditors of payment from the pay which the Government allows to officers on the retired list. It may or it may not be dishonorable for a man not to pay his debts; but that may depend

upon how he incurred them and whether it is within his human possibilities to pay them."

As to this last point, it does not appear anywhere that the debts were dishonorably incurred, or with the intention of not paying them; while as to the question of "human possibilities," there is not the slightest averment or intimation that the claimant was pecuniarily able to discharge the obligations he had incurred. How then can the charges be helped out by the fact that the creditors were assured of payment from the pay allowed officers on the retired list? Both the common law and the statute forbade the assignment by the claimant of his pay or any portion thereof. 2 Story, Equity Jurisprudence, sec. 1043-E; Rev. Stats. sec. 3477. Surely that which the law forbade him to assign could not be either legally or morally pledged. It therefore comes back to the same as the other charges, a mere promise to pay, not discharged at the appointed time.

We therefore submit that the action of the court-martial was without jurisdiction, null and void, and that, whether approved or not approved, its sentence was a nullity and Capt. Fletcher never out of the service.

2. The Sentence Never Approved till July 5, 1888.

Was the sentence of the court-martial, that Capt. Fletcher be dismissed from the service ever validly approved by the President of the United States, and if so, at what date?

Of course, if we are right in the view we have taken of the first branch of the case, there was nothing for the President to approve, and it becomes immaterial to inquire whether that approval was ever given. If, however, the court-martial had jurisdiction and its sentence was valid, the question becomes a material one.

The 65th Article of War, act of April 10, 1806, 2 Stat. 367, Chap. 20, which was in force at the time of these proceedings, provided that—

"Any general officer commanding an army, or colonel commanding a separate department, may appoint general courts-martial, whenever necessary. But no sentence of a court-martial shall be carried into execution until after the whole proceedings shall have been laid before the officer ordering the same, or the officer commanding the troops for the time being; neither shall any sentence of a general court-martial, in time of peace, extending to the loss of life, or the dismission of a commissioned officer, or which shall, either in time of peace or war, respect a general officer, be carried into execution, until after the whole proceedings shall have been transmitted to the Secretary of War, to be laid before the President of the United States, for his confirmation or disapproval, and orders, in the case. All other sentences may be confirmed and executed by the officer ordering the court to assemble, or the commanding officer, for the time being, as the case may be."

The requisites of an order of confirmation by the President were clearly set forth by this court in *Runkle* v. *United States*, 122 U. S. 543. It was there held, p. 561, that

"It will not be sufficient unless it is authenticated in a way to show otherwise than argumentatively that it is the result of the judgment of the President himself, and that it is not a mere departmental order which might or might not have attracted his personal attention. The fact that the order was his own should not be left to inference only."

An examination of the order of Secretary Belknap of July 24, 1872, in the present case, approving the proceedings, findings, and sentence, p. 5, shows conclusively that it lacks every requisite of a valid order of confirmation of court-martial proceedings. It states that the proceedings

of the court-martial "have been forwarded to the Secretary of War for the action of the President." In another sentence and paragraph it adds, "the proceedings, findings, and sentence are approved, and the sentence will be duly executed." It bears the signature of the Secretary of War without any statement whatever that it has been affixed by order of the President, or without the slightest evidence of a submission to the President. Commenting on the form of this order the present learned Acting Judge-Advocate-General of the Army justly remarks, "There is here no evidence that the proceedings were *laid before the President*, and that the sentence received his approval; in other words, that the proceedings have ever been acted on as the law requires." And following this opinion the Secretary of War under the last administration, Hon. William C. Endicott, states, p. 9, "It appears from these facts that Captain Fletcher is still undoubtedly an officer of the Army, and that the proceedings of the court which tried him are now awaiting action by the President." In this conclusion of these high officers we have no doubt this court will agree.

Perhaps some reliance will be placed by the Attorney-General on *United States* v. *Page*, 137 U. S. 673. But the difference between the order there considered and adjudged sufficient and the one now before the court is fundamental and radical. In the Page case a submission of the whole proceedings to the President was affirmatively and definitely set forth. The language (p. 676) was, "In conformity with the 65th of the Rules and Articles of War, the proceedings of the general court-martial to the foregoing case have been forwarded to the Secretary of War, and by him submitted to the President." And subsequently it was stated that "the proceedings and findings" upon certain charges and specifications "are approved," and still later on, that "the sentence is approved." In the

present case of Captain Fletcher the order of 1872 simply states in one paragraph that the proceedings, etc., "have been forwarded to the Secretary of War for the action of the President," and in another, that "the proceedings, findings, and sentence are approved, and the sentence will be duly executed." This language is not inconsistent with the idea that this was a mere approval of the proceedings by the Secretary of War, and in order to reach any such conclusion as that it was the act of the President, requires the resort to two distinct presumptions:

1. That the record was actually submitted to the President.

2. That the President approved the proceedings, findings and sentence.

It is said in the Page case, p. 678:

"Undoubtedly the action required of the President under this article is judicial action. He decides personally, and the judgment is his own personal judgment, and not an official act presumptively his."

And again, pp. 679, 680:

"Since, therefore, it appeared by the order of the Secretary of War, written upon the record of the court-martial in controversy, that the proceedings had 'been forwarded to the Secretary of War, and by him submitted to the President,' and that the proceedings and findings upon certain charges and specifications were approved, and that the sentence was approved, the only possible conclusion to be drawn from such statement is that the approval was by the President, in whom alone was reposed the authority to act. The Secretary of War declared that he had submitted the proceedings in conformity with the 65th of the Rules and Articles of War; and the 65th Article required the whole proceedings to be laid before the President for his confirmation or disapproval, and

orders, in the case. By what process of reasoning can the conclusion be justified that, although these proceedings were laid before the President for his confirmation or disapproval, yet the findings and sentence were approved by some one else, who had no authority to act in the premises? On the contrary, *where the record discloses that the proceedings have been laid before the President* for his orders in the case, the orders subsequently issued thereon are presumed to be his, and not those of the Secretary by whom they are authenticated; and this must be the result here, *where the approval follows the submission* in the same order."

Then distinguishing that case from that of Runkle, in which it appeared that the proceedings, findings, and sentence of the court-martial were transmitted to the Secretary of War, and that the Secretary wrote upon it an order approving the proceedings, findings, and sentence, and stating that "the President is pleased to remit all of the sentence except so much thereof as directs cashiering, which will be duly executed," the opinion adds, p. 680:

"In *Runkle* v. *United States*, 122 U. S. 543, *the record failed to show the vital fact of the submission of the proceedings to the President.* The findings of the Court of Claims in that case upon this point were that the proceedings, findings, and sentence of the court-martial were transmitted to the Secretary of War, who wrote upon the report that such proceedings, findings, and sentence were approved. But it was not found, nor did the Secretary's indorsement show, that the *whole proceedings had been submitted to the President.*"

Again, p. 682, still commenting on the Runkle case:

"The inference that the President had personally acted could, indeed, be properly drawn from the substantive fact of the submission of the proceedings to him, *if that had appeared; but presumption could not supply that*

fact, and then a presumption upon a presumption be availed of to make out that the approval was the President's personal act. This, as the Chief Justice remarked, would leave the fact that the order was his own, to inference only."

So in this case, in order to justify the idea that the order of approval was that of the President, it is necessary (to borrow the language of the opinion in *United States* v. *Ross*, 92 U. S. 281, 283), to "pile inference upon inference and presumption upon presumption." The record here, like that in the Runkle case, as explained in the Page case, "*fails to show the vital fact of the submission of the proceedings to the President.*" In the view taken by this court, the vital fact—the essential requisite to a valid order of confirmation of court-martial proceedings—is that the record must definitely and affirmatively show a *submission of the whole proceedings to the President.* As this record is throughout deficient in any showing of a submission of the proceedings to the President in 1872, the Page case, instead of being an authority against the present one, is, in its explanation and approval of the doctrines decided in the Runkle case, an authority in its favor.

The Court of Claims so regarded it; for its decision on this case—which, on the point now under consideration, was wholly favorable to the claimant—was rendered after and in full view of the decision of this court in the Page case.

The present case is also like the Runkle case and unlike the Page case in another circumstance of much determining weight. In the Runkle case, as in this, the proceedings were re-examined by a subsequent President to the one during whose administration the first order of dismissal was entered, and another order made unquestionably emanating from the President. In the Page

case no such order was ever made. The decision of the President in both the case at bar and that of Runkle was that the proceedings were open and awaiting his action. In such a case the principle decided in *Blake* v. *United States*, 14 C. Cls. 462 (affirmed, 103 U. S. 227), may properly be invoked that the decision of the President on the character of an official document laid before him is conclusive upon all other branches of the Government, Executive and Judicial. The question there was whether a certain paper purporting to be a resignation of an officer was in fact and in law the act of the officer whose name it bore. Here the question presented to President Cleveland in 1888 was whether certain court-martial proceedings were inchoate and awaiting his action, or complete and settled. President Cleveland here held, under the advice of the highest military authorities, that they were incomplete and awaiting the final action of the Executive. He took that action and thereby declared the inconclusiveness of the prior confirmation. This was another material point of difference between the Runkle and Page cases alluded to by this court, in the latter, 137 U. S. 681, as distinguishing the two. It is a material, and we think conclusive, circumstance, classing the case at bar with that of Runkle and distinguishing it from that of Page.

It can not be claimed that President Cleveland's order of July 5, 1888, approving the proceedings, had any retrospective operation so as to sever the claimant's connection with the service at any day earlier than its date. Winthrop, treating of the punishment of dismissal, says:

"This punishment is executed, by operation of law, immediately *upon approval or confirmation, and notice* to the officer. Upon the day of the official announcement to an officer of the approval or confirmation by the proper authority of a sentence dismissing him from the military service, his connection with the army at once ceases and he becomes a civilian."

With reference to cases like the present, where considerable time has elapsed between the date of the original sentence and its confirmation by the reviewing authority, he adds:

"It need hardly be added that, even where a considerable delay has, without fault of the reviewing officer, occurred in acting upon a sentence of dismissal, the same can not legally be made, by the order of that officer, to take effect as of a date *prior* to that of his final action,—as of the date, for example, of the actual adjudging of the sentence by the court."

The distinguished author supports these positions by argument and citation of numerous authorities. 1 Winthrop, Military Law, 574, 575.

This is also the English rule; for, in announcing the King's approval of the sentence of dismissal of Lieutenant Myers, the Judge Advocate-General (addressing the culprit's commanding officer) concludes—"Your Lordship will be pleased to favor me with a communication of the day on which his Majesty's pleasure shall have been notified to Lieutenant Myers, that I may acquaint the Secretary at War therewith, as *from that day* his pay will cease." James, Collection of Charges, Sentences, etc., pp. 206, 207.

Of course if the point we have first taken that the court-martial was utterly without jurisdiction to try Capt. Fletcher for the offenses with which he was charged is sustained, it must necessarily be held that the action of President Cleveland in 1888 was as ineffectual to sever the connection of the claimant with the Army as was that of Secretary Belknap in 1872. There can be no valid confirmation of void proceedings. The President may not in time of peace dismiss an officer from the service except in pursuance of the sentence of a court-martial. (Revised Statutes, § 1229.)

It may be added that no point can be made on behalf of the Government in this case either of the circumstance that the claimant may not have made a formal tender of his services, or that the retired list may have been full without his name. He was retired from active service, without duties. The law in force at the time provided "that no retired officer of the Army shall hereafter be assigned to duty of any kind." Act January 21, 1870, 16 Stat. 62. He made prompt and repeated appeals to Congress for reinstatement (Finding VII, p. 6; see also List of Private Claims brought before the Senate, Vol. 1, p. 596; List of Private Claims presented to the House of Representatives from the 42d to the 46th Congress, p. 222), so that in no sense can he be said to have relinquished his claim to the office. Besides the Government has not only not lost anything by his failure to sue at an earlier date, it has positively gained many thousands of dollars of back pay for which this claimant is forbidden here to ask a judgment by force of the statute of limitations. There can be no estoppel unless a party has been in some manner misled by the conduct of another, or induced in some way to change his position to his disadvantage. Estoppels are not favored defenses in the law, and their technicality must in all cases be subordinated to the equities of the case. *Cape Ann Granite Company* v. *United States*, 20 C. Cls. 1, 12.

In a claim of this character a retired officer stands on quite a different footing from one in the active service, as was pointed out in *Ide* v. *United States*, 25 C. Cls. 401.

In *Blake* v. *United States*, 103 U. S. 227, followed in *Keyes* v. *United States*, 109 U. S. 336, and *Mullan* v. *United States*, 140 U. S. 240, this court decided that the President has the power to supersede or remove an officer of the Army or Navy, by the appointment, by and with the advice and consent of the Senate, of his successor, and that

it was not the purpose of the 5th section of the act of July 13, 1866, 12 Stat. 92, now embodied in section 1229 of the Revised Statutes, to withdraw that power, but only to prevent the President from exercising it without the concurrence of the Senate. In all those cases, however, the appointment of the successor of the superseded officer was in terms made for the purpose of superseding him, and the nomination to the Senate expressly stated that the nomination was made "*vice*," or "in place of" the removed officer, naming him. Nothing of the kind appears in the present case. The maximum of the retired list was filled by an order retiring an officer from active service without any reference whatever to the claimant and with no confirmation by the Senate. In place of the officer thus retired another was promoted to the rank of captain and was confirmed by the Senate. But in all this there was no reference whatever to the claimant Fletcher. Thus no consent whatever on the part of the Senate was ever asked for or given to his dismissal. The fact that the retired list was filled to its maximum by the President's order retiring Captain Meyer, did not affect the claimant's rights.

Precisely the same point arose in the Runkle case. It there appeared, 122 U. S. 549, that prior to the time of issuance by President Hayes of his order disapproving the proceedings of the court-martial and restoring Runkle to the Army, the retired list of the Army had been filled to its maximum of three hundred, so that, of course, some other officer must have been retired to take Runkle's place on the retired list. This court held under these circumstances, that the principle of the Blake case did not apply, and said with reference thereto (p. 558): "In *Blake* v. *United States*, 103 U. S. 227, followed in *United States* v. *Tyler*, 105 U. S. 244, it was decided that the President had power to supersede or remove an officer of the Army by

the appointment, by and with the consent of the Senate, of his successor; but here there was nothing of that kind. Runkle was never removed otherwise than by the sentence of the court-martial, and the order of the War Department purporting to give it effect." The same circumstances exist in the present case, and can not fail to lead to an over-ruling of this ground of defense, should it be renewed here.

It is never too late to correct a wrong. If the present claimant is vindicated in this case, he will not have waited for that vindication as long as Fitz John Porter did for his (24 Stat. 107, 108), while the offences with which the present claimant was charged are but the veriest trifles compared to those laid at the door of Porter. Whatever may have been said of the present claimant, he has at least never been charged with cowardice, with disaffection to the flag of his country, with failure to obey military orders. His military record is untarnished and clear. It remains for this court to say whether this gallant soldier of the Nation can be stricken down upon a record of such proceedings as those disclosed in the present case.

We ask that the judgment be affirmed for the amount allowed, and an additional amount be awarded to cover the claimant's pay to November 30, 1890, the last day of the month before the filing of his amended petition.

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